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ENVIRONMENTAL LIABILITY AND INSURANCE COVERAGE IN BRITISH COLUMBIA:

A Primer on Contaminated Sites and Clean-Up Cost Recovery Litigation

by

Neo J. Tuytel
and
Jonathan L.S. Hodes
Environmental and Insurance Law Groups
Clark Wilson LLP
tel. 604.687.5700
njt@cwilson.com (direct 604.643.3180)
jlh@cwilson.com (direct 604.643.3168)

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ENVIRONMENTAL LIABILITY AND INSURANCE COVERAGE IN BRITISH COLUMBIA:

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I. INTRODUCTION

Q: What do environmental contamination, real estate development and liability insurance have in common? **A:** Millions of dollars more than you might have thought before you read this paper, especially here in British Columbia.

The purpose of this paper, as the title indicates, is to serve as a primer on contaminated sites and clean-up cost recovery litigation in B.C.. The two main sections of the paper therefore focus on both statutory and common law liability for environmental contamination, on the one hand, and liability insurance – whether commercial, errors and omissions or even homeowners – on the other.

Our starting point, in the first section of the paper, will be the single most important piece of environmental legislation in this Province, the *Environmental Management Act* ("EMA").[1] That will be followed by most of the administrative and judicial decisions which have considered the Act, and the *Contaminated Sites Regulation* (the "CSR"),[2] and then some of the leading and more recent cases regarding tort liability for environmental contamination. The former will draw heavily upon research and submissions prepared by one of the authors (Tuytel), with respect to the Britannia Mine administrative remediation order process, and the *Beazer* (Koppers) cost recovery litigation. Only that part of the paper dealing with the EMA and CSR has been updated in 2006.

The second part of the paper will focus on judicial interpretation of the so-called absolute pollution exclusion clause in CGL policies. This will be based upon a paper by Mr. Hodes, and similarly draws from the authors' experience (often as co-counsel) on various environmental liability and insurance coverage matters.

Particularly given the lack of case law on liability, let alone insurance defence and indemnity under EMA and the CSR, this paper is very much a work in progress.

[1] S.B.C. 2003, c. 53 ("EMA")
[2] *B*.C. Reg 375/96 and amendments

II. CIVIL LIABILITY FOR ENVIRONMENTAL CONTAMINATION

There are many different way that liability for environmental claims can be imposed. Legislation and the common law both allow for individuals to seek remedies through the courts.

A. STATUTORY LIABILITY IN BRITISH COLUMBIA - *ENVIRONMENTAL MANAGEMENT ACT* AND *CONTAMINATED SITE REGULATION*

As noted above, the starting point for civil liability for environmental contamination in this Province consists of EMA and the CSR. Additionally, the common law offers a wide range of torts which may be claimed separately or in combination to customize an action for damages.

The *Environmental Management Act* ("EMA") received Royal Assent on October 23, 2003, amalgamating and replacing two statutes, the *Waste Management Act*[3] ("WMA") and the *Environmental Management Act*.[4] EMA was proclaimed into force on July 8, 2004, and now sets out the basic framework for environmental protection and regulation in British Columbia. That was previously done by the WMA, which had been in force since 1997, and pursuant to which the CSR was promulgated.

(i) Overview of EMA and CSR

In a nutshell, the combined effect of EMA and the CSR is twofold. First, it confers upon the Province – specifically the Ministry of Environment – sweeping powers, among other things, to issue administration orders against private parties, to clean-up "contaminated sites" at their own cost. Second, it creates a statutory cause of action by such parties, against other 'responsible persons' to recover their reasonably incurred costs of remediation.

Those two processes therefore create new rights, and impose additional duties upon members of the public and private sectors, respectively. Furthermore, as we will see, they can proceed either independently of one another, or in parallel, and are based on the same, legislatively created principles. However, even though they came into existence the better part of a decade ago, there is still remarkably little caselaw, and therefore consensus about how they should operate, and with what effect, upon whom.

One way of beginning to understand this regime, is to consider the following questions:

- What is a "contaminated site"?
- Who are "persons responsible" for cleaning up contaminated sites?
- Are there any exemptions from such responsibility?
- What is the scope of such responsibility?
- How is responsibility allocated between 'responsible persons'
- Are there any preconditions to cost recovery actions?

[3] R.S.B.C. 1996, c. 482 ("WMA")
[4] R.S.B.C. 1996, c. 118

(ii) What is a Contaminated Site?

Pursuant to section 39(1), a "contaminated site" is defined as:

> "an area of land in which the soil or any groundwater lying beneath it contains a special waste, or… another prescribed substance in quantities or concentrations exceeding prescribed criteria"

Such "criteria" are "prescribed" by the CSR.

(iii) Who is Responsible for Cleaning up Contaminated Sites?

Pursuant to section 45(1), the following persons are responsible for remediation at a contaminated site:

- "a current or previous owner" or "operator" of the site or a site from which a contaminating substance migrated; and
- a "producer" or 'transporter' of a substance that caused the site to become contaminated;
- among others.

Most people instinctively know what an "owner" of property is. However, EMA goes further than the usual meaning. An "owner" is defined in section 39(1) as:

> "a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property"

As we will see, the concept of 'control' can include within the category of "owners" tenants, as well as landlords, and parent, as well as subsidiary and merged or amalgamated companies, together with their directors, officers and employees.

An "operator" is defined as:

> "a person who is or was responsible for any operation located at a contaminated site"

As we will also see, the concept of 'responsibility' has also been interpreted broadly, and can include a wide range of both corporate and individual "persons". Among other things, 'corporate veil', or limited liability of companies has little if any application under EMA.

Pursuant to section 45(1)(d) and (e) persons are also responsible for remediation at a contaminated site if they either "produced" or "transported" "a substance, and

> …by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site"

Pursuant to section 45(2), a person who qualifies as an "owner", "operator", 'producer' or 'transporter' of "the site from which [a] substance migrated" is also "responsible for

> remediation at a contaminated site that was contaminated by migration of [the] substance to the contaminated site"

(1) Companies

Companies can clearly be named as "owners" and "operators" and have been included as responsible parties in many remediation orders to date (per *Beazer East Inc. v. British Columbia (Environmental Appeal Board)*[5] and *Lawson v. Deputy Director of Waste Management*[6]).

Mergers and/or Amalgamations

Merging or amalgamating companies will not help to avoid corporate liability; in fact, it can only make things worse. Pursuant to the provisions of either the provincial or federal *Business Corporations* legislation, and the decision in *R. v. Black & Decker Manufacturing Co. Ltd.*[7], the amalgamated company assumes the liabilities of each amalgamating company. Under EMA, therefore, the successor company can be saddled with all the responsibilities of an "owner" or "operator" and accordingly the exposure to administrative orders or civil actions of each and every one of its predecessors (per *Beazer*, *supra*, at paras. 163 – 164).

British Columbia (Hydro and Power Authority) v. British Columbia (Environmental Appeal Board)[8]

The issue in this case was whether B.C. Hydro was liable under the WMA for a Remediation Order. Between 1920 and 1957, B.C. Electric supplied coal tar to the site at issue. B.C. Hydro and B.C. Electric amalgamated in 1965. In 1998, it was discovered that the site had been contaminated by coal tar supplied by B.C. Electric. Moreover, that contamination had affected other properties including the Fraser River.

The British Columbia Court of Appeal held that B.C. Hydro was not a "responsible person" under the Act for a number of reasons. The Supreme Court of Canada, however, reversed the Court of Appeal's decision and adopted the reasons from Madame Justice Rowles, in her dissenting opinion, in the Court of Appeal.

Madam Justice Rowles observed that the appellant conceded that if B.C. Electric was still in existence, at the time contamination was discovered, it would be a "responsible person" based upon its pre-amalgamation activities. But the appellant argued that the amalgamation agreement precluded this possibility by limiting the liability of B.C. Hydro to only those liabilities that existed immediately before the amalgamation. This would mean that, because the contamination

[5] Environmental Appeal Board 2000 BCSC 1698
[6] Environmental Appeal Board, Appeal Nos. 1998-WAS104(c), 030(a), 034(a) and 1999-WAS-015(a), September 19, 2001
[7] (1974) 43 D.L.R. (3d) 393 (SCC)
[8] [2003] B.C.J. No. 1773 (B.C.C.A.) reversed [2005] S.C.J. No.2

of the site was a liability which arose after the amalgamation, B.C. Hydro was not accountable for the contamination.

Madam Justice Rowles first considered the effect of amalgamation. Relying upon the reasoning in *Black, supra*, she observed that the effect of amalgamation is that the rights, duties and liabilities of the amalgamating parties continues uninterrupted into the new entity.

In dealing with the appellant's submission that liability was limited to immediately before the amalgamation, Madam Justice Rowles found that the words of the amalgamation agreement did not bear that interpretation. Rather, the words relied upon by the appellant had the same effect as the word "thereafter". Instead of limiting liability the words in the amalgamation agreement established that the new entity has all the liabilities of the old entity. As a consequence, if a liability arose out of something done by B.C. Electric in the past, B.C. Hydro would be accountable for that past action. In turn, B.C. Hydro was a "responsible person" pursuant to the WMA and bound by the Remediation Order. With respect to policy considerations, Madam Justice Rowles noted that if the Court accepted the appellant's arguments, then it would destroy the rights of innocent third parties.

Finally, Madam Justice Rowles did not discuss whether the legislature intended the Act to have retroactive effect. The conclusion she reached was premised upon the effect of amalgamation and the interpretation of the amalgamation agreement, neither of which depend on retroactivity.

Shoal Point Management Ltd. et al v. ICI Canada Inc.[9]

The plaintiff sought the costs of remediation for a contaminated property in Victoria from the defendant, ICI Canada Inc. The plaintiff submitted that the defendant was a "responsible person" under the provisions of the EMA. The property was once owned by Canadian Industries Limited ("CIL"). CIL transferred its interest in the property on May 15, 1946. ICI was incorporated on February 10, 1954, under the name Canadian Industries (1954) Limited ("CIL 54"). On May 11, 1954, the Superior Court of the Province of Quebec approved a compromise agreement between CIL, the holders of CIL's preferred shares and the holders of CIL's common shares.

Under the compromise, each of CIL 54 and Du Pont of Canada Limited acquired assets from and assumed certain liabilities of CIL. Since CIL had transferred the property in 1946, it was not one of the assets transferred under the compromise. In addition, CIL, CIL 54 and Du Pont of Canada entered into a segregation agreement, whereby any liabilities unknown at the time of the certification of accounts, would be assumed by CIL 54 and Du Pont of Canada one-half each.

The British Columbia Supreme Court held that the compromise was not an amalgamation. The compromise allowed CIL to divest certain assets to CIL 54 while retaining others. Accordingly, this case is distinguishable from the *B.C. Hydro* case. Further, the Court held that CIL 54 does not become liable to third parties for liabilities it may have assumed according to the agreements. CIL 54 had no involvement with the property in question.

[9] [2006] B.C.J. No. 1229

The Court found that the segregation agreement was not helpful to the plaintiff because the plaintiff was not a party to the contract. However, the Court declined to comment on whether CIL 54 could be liable under the segregation agreement to other parties for the costs of remediation. In short, the claim against the defendant was dismissed.

Parents and Subsidiaries

Where the company is a parent company, in order to be classified as an "owner" to attract liability for remediation orders, the parent company must have a legal right of control over the subsidiary which directly affected the property in question. In other words, if the parent company had some legal control over the property in terms of how that property was to be used then it could be deemed an "owner" and subject to liability. Mere ability to control the subsidiary company is not enough. The control has to extend to the use of the property itself. (per *Beazer*, paras. 95-99).

Alternatively, a parent company can be deemed an "operator" for the purposes of attracting liability for remediation orders merely by controlling any operations at the contaminated property. A parent company which makes the decisions with respect to an operation is "in control" of the operation and a parent company who has the authority to make the decisions with respect to an operation is "responsible" for the operation. This can extend to cover:

1. control of the financial operations of the subsidiary;

2. control of the organizational and decision-making structures that affected the property;

3. control of any leasing decisions or approvals of the property;

4. control of or involvement in the environmental management of the property exercised by the subsidiary.

(all per *Beazer*, paras. 108-110 and 114)

Beazer v. British Columbia[10]

This case involved an application by Beazer and its subsidiary Atlantic Industries for judicial review of the decision of the Environmental Appeal Board which upheld the decision of the Assistant Regional Waste Manager to name Beazer and Atlantic as responsible persons in a remediation order. The property in issue had become contaminated by previous owners prior to being leased to Atlantic Industries. The issue in this case was whether both Beazer and Atlantic Industries fell under the definition of either "owner" or "operator" of the site which would accordingly determine responsibility for remediation costs.

[10] 2000 BCSC 1698

Beazer argued that it was not an owner or operator merely by being the parent corporation of the operator. It further argued that it was entitled to an exemption as a result of its remediation work already done on the site. Atlantic argued that it became the operator after the contamination had already occurred and was improperly named as a responsible person.

The application was dismissed and the court held that neither the definition of owner nor operator required actual control of the day to day operations. It was sufficient that Beazer was in control of any operation on the site.

It is important to note that subsidiaries themselves do not need to be classified as the most 'substantial contamination contributor' to fall within the definition of either "owner" or "operator". Accordingly, any amount of contribution to the contamination by a subsidiary will serve to saddle it with liability (per *Lawson*, *supra*, at p. 33 and *Beazer* at para. 164).

However, with respect to civil cost recovery actions, section 35(5) of the CSR provides that a parent company is not liable for the cost of any damages arising out of the actions of a subsidiary company unless the person bringing the action can prove that the parent company authorized, allowed or consented to the subsidiary's actions that caused the damage.

Directors, Officers and Employees

Pursuant to section 39(1), "person" is also broadly defined, and "includes any director, officer, employee or agent of a person".

The broad scope for "owner" and "operator" is enough to include all directors and officers of a company based solely on the position they hold without any actual involvement in the contamination of the property. Accordingly, directors and officers of a company classified as an "owner" or "operator" become responsible persons themselves and subject to liability for administrative remediation orders and civil cost recovery actions, as well as fines and offences (per *Lawson* at pp. 31-32).

As with parent companies, responsibility for remediation costs incurred pursuant to a clean-up order by MWALP can be borne by directors and officers of "owner" or "operator" companies that did not actually cause or contribute to the contamination on the property. However, with respect to civil cost recovery actions, section 35(4) of the CSR provides that directors and officers are not liable unless the person bringing the action can prove that the directors or officers authorized, allowed or consented to the actions that caused the contamination (per the decision in *Lawson*, *supra*, at pp. 38-39).

Lawson v. Deputy Director

At the heart of the *Lawson* matter was a property at 9250 Oak Street, in Vancouver. For approximately 63 years (from 1923 to 1986), it was used by various companies to manufacture roofing, paving and building materials. As a result of all of this industrial activity, the Oak Street property became contaminated with coal tar and its byproducts.

The property was sold to Globe West Products in 1980. Globe West was a British Columbia company incorporated on November 6, 1980, dissolved December 19, 1986, restored on May 20, 1989, dissolved again on August 17, 1995, and finally restored on September 25, 1997, for a limited period of two years pursuant to an Order of the BC Supreme Court. Globe West was a subsidiary of a parent company, Globe Asphalt Products. After an amalgamation with other companies in 1982, and a name change in 1987, the parent company, Globe Asphalt, became known as GN Industries, an Ontario company. GN ceased doing business in Ontario in 1991, and was wound up. During the relevant period, Lawson served as president and director of each of these companies. Lawson resided in Ontario and had never been a resident of British Columbia.

Lawson appealed his inclusion as a responsible person in a Remediation Order issued by the Deputy Director on May 20, 1998. The main issue before the Board was whether Lawson was a "responsible person", either personally or in his capacity as president and director of Globe West, Globe Asphalt, or GN.

The Board, in providing its decision, held that a director or officer of a corporation that is or was an owner or operator could be deemed responsible for remediation, since one of the purposes of the WMA was that beneficiaries of contamination, including directors and officers of responsible corporations, were responsible for site remediation (see pages 31-32). The Board also found that it was clear that, as a director and officer of a corporation that was owner and operator of the site, Lawson was a responsible person in relation to the site.

Additionally, the Board found that Lawson could be held responsible in his own right for contamination at the site following the dissolution of Globe West in 1986. The Board concluded that he was acting in his personal capacity when he provided instructions, signed contracts, and corresponded with businesses and the owner of the site regarding the decommissioning (see pages 38-39). It was clear that Lawson held a significant degree of control over, and was responsible for approving, certain operations at the site during the decommissioning. As such, Lawson was an "operator" at the site and was a person responsible for remediation. Furthermore, the Board held that it was not limited to determining responsible persons based solely on those who were the "most substantial contributors" to the contamination of the site. The WMA clearly stated that a remediation order could be issued to any responsible person (see pages 33-34).

(2) Governments

Pursuant to section 39(1), "person" also "includes a government body", and "government body" is defined as:

> "a federal, provincial or municipal body, including an agency or ministry of the Crown in right of Canada or British Columbia or an agency of a municipality"

Section 39(2) of EMA does provide governments with considerable immunity for both remediation and cost recovery purposes:

"(2) A government body is not an operator only as a result of

1. exercising regulatory authority with respect to a contaminated site,

2. carrying out remediation at a contaminated site, or

3. providing advice or information with respect to a contaminated site or any activity that took place on the contaminated site."

However, that is only as "operator", and not as "owner", and the province has substantial ownership rights in B.C. For example, regarding Britannia, it was clear that the Crown in right of the province owned Howe Sound (see *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*,[11] and *R. v. Crown Zellerbach Canada Ltd.*[12]), which was a very significant part of the "contaminated site" in question. For much the same reason, B.C. also owns the bed of the Fraser River, which is a big part of the *Beazer* site.

The Province also owns all surface and sub-surface water within its borders, pursuant to the *Water Act*.[13]Further, if one applies basic principles of statutory interpretation to section 44(2), it is arguable that the "exercise [of] regulatory authority" could also make the Province a "responsible person". Section 39(1) defines both "operators", and "owners", each of which is a category of "responsible person", and section 39(2) provides immunity to 'government bodies' for the former, but not the latter category. *Expressio unius est exclusio alterius.*

To paraphrase the Act, then, although "[a] government body is not an operator [,it may still be an owner,] only as a result of" "exercising regulatory authority", "carrying out remediation" or "providing advice or information with respect to a contaminated site or any activity that took place on the contaminated site". (ex. see *Re Medical Centre Apartments Ltd. and City of Winnipeg*,[14] *R. v. Shubley*,[15] and Driedger on the Construction of Statutes.[16]

(iv) Are There any Exemptions From Such Responsibility?

Both EMA and the CSR provide limited exemptions from liability for certain "persons" in regards to costs associated with remediating contaminated property.

Section 46 of EMA sets out the criteria for "persons not responsible for remediation" of contaminated property which essentially fall into two broad categories of exemptions:

- innocent purchasers; and
- the innocent owners/operators.

[11] (1977), 1 B.C.L.R. 97 (B.C.C.A.), affirmed A.G.B.C. v. A.G. Canada, [1984] 4 W.W.R. 289 (S.C.C.)
[12] [1984] B.C.J. No. 1405 (C.A.)
[13] R.S.B.C. 1996, c. 483
[14] (1969), 3 D.L.R. (3d) 525 (Man.C.A.)
[15] (1990), 74 C.R. (3d) 1 (S.C.C.)
[16] (3rd Ed.), Butterworths, pp. 168-70)

Pursuant to section 46(e) if an owner or operator can show that at the time of purchase they had no knowledge that the site was contaminated and had conducted reasonable investigations to that effect, then they may be able to avoid liability.

The other provisions of section 46 provide for innocent owner/operator scenarios such as where the site was not contaminated prior to purchase and the owner/operator did not dispose of any materials that would contaminate the site or for cases where contamination migrated to a clean site from an adjacent property. Under such situations, liability may also be exempted.

Part 7 of the CSR sets out which persons may or may not be held liable for statutorily imposed contaminated site remediation costs. Some of those persons which may be excluded are:

- transporters or arrangers (s. 19);
- sureties (s. 20);
- insurers and insurance brokers (s. 21);
- certain owners (s. 22);
- producers arranging for transportation (s. 23);
- persons providing contracting or consulting services in regards to construction of buildings at the site (s. 24);
- secured creditors (s. 25);
- receivers, receiver managers and bankruptcy trustees (s. 26);
- trustees, executors, administrators and other fiduciaries (s. 27);
- innocent owners who have undertaken all due diligence requirements (s. 28);
- owners who leased the property to other parties (s. 29);
- lessors under the Petroleum and Natural Gas Act (s. 30);
- ttransporters of contaminated soil (s. 32); and
- where the site is contaminated only by substances being managed in accordance with a wide area remediation plan.

In regards to civil liability, section 35 of the CSR sets out some guidelines in terms of determining compensation payable under s. 47(5) of the EMA – ie. civil suits initiated by any party who has incurred costs remediating a site and who seeks contribution from other responsible parties.

It should be noted that section 47(7) of EMA requires that the site that is the subject of the action be determined or considered under section 44 to be or have been a contaminated site before the court can hear the claim. However, if independent remediation has been carried out prior to such a determination or consideration, the court must determine whether the site had been contaminated (pursuant to s. 47(8)).

(v) What is the Scope of Such Responsibility?

EMA provides that all past or present "owners", "operators", "producers" and "transporters" and others are "absolutely, jointly and severally and retroactively responsible" for reasonably incurred costs of remediating a contaminated site, whether pursuant to a administrative remediation order or civil judgment for recovery of clean-up costs. Broken down by the key words:

- "Retroactively" means that liability for contamination in the province of British Columbia goes back to the date that it occurred. For example, the Britannia Mine, along the Sea-to-Sky Highway, began operating in about 1905 and permanently closed in 1972, but continued to discharge acidic, metal-laden water into Howe Sound even afterward. More that two decades after the mine was closed, a remediation order was issued against the then owner of the property. When they failed to comply, a further order was sought against corporate successors, by merger and/or amalgamation, of various historical owners and/or operators of the mine, including a major, United States-based multi-national.

- "Jointly and severally" means that any one responsible person can be held legally liable for all of the clean up costs, regardless of how much or little contamination they caused. Therefore, (ex.) one company that had owned the site of the then closed mine for about a year and a half, was potentially liable for the entire, multi-million dollar cost of remediation. In the Beazer case, a real estate development company had, over a few months, syndicated the warehouse facility built on the former site of a wood preservation plant, which had already - ostensibly - been cleaned up to the satisfaction of both the provincial governments. More than a decade later, they were sued by other historical owners and/or operators for a clean-up costs of several times what they had bought and sold the property for – in the order of a hundred times their alleged profit on the syndication.

- "Absolutely" means without fault, and goes beyond even 'strict' liability . That is, if a party is now, or ever was an owner or operator of what is now a contaminated site, then it can be legally liable for one hundred percent of the clean-up costs, even if was not negligent, did not breach any contracts, complied with all environmental laws at the time, and had nothing whatsoever to do with the contamination.

So, under EMA and the CSR you, your company, your insured or your client can become liable for pollution caused or contributed to by others, whether before or after your involvement as the owner or operator of property (or as a "producer" or "transporter" of contaminants). If you, your

insured or your client buy, or even lease a piece of land, you can inherit all of the environmental contamination associated with it. Furthermore, a company inherits all of such liabilities or responsibilities of each and every one of its successors, by merger and/or amalgamation.

(vi) How is Responsibility Allocated Between 'Responsible Persons'?

In the authors' view, the main guiding principle with respect to allocation of responsibility between 'responsible persons' is: who did the polluting and which costs of remediation are attributable to what pollution? That is what should govern the apportionment of damages in cost recovery actions. It is not who 'benefited' from (ex.) the mere ownership of the land, separate and apart from their involvement in the activities that caused either the contamination itself, or the cost attributable to it.

A useful starting point for determining liability in a cost recovery proceeding under section 45(4) of EMA is section 35 of the CSR. However, as we will see momentarily, CSR section 35 is far from the last, let alone the only word on allocating responsibility between potentially responsible persons.

Nevertheless, it does clearly express the 'polluter pays' principle, and is reproduced, in its entirety, as Appendix "B" to this paper. That the polluters should pay is readily apparent from, among other matters, the following words and phrases in section 35 of the Regulation:

- "In an action … under section 47(5), the … factors [which] must be considered [include] the amount of contaminating substances and the toxicity attributable to the persons involved in the action" (see subsection (2), paragraph (c));

- "[Another factor which must be considered is] the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated" (subsection (2), para. (d));

- "[Another factor is] the relative due diligence of the responsible persons involved in the action" (subsection (2), para. (b));

- "In an action under section 47(5) of the Act against a director, officer, employee or agent of a person or government body, the plaintiff must prove that the director, officer, employee or agent authorized, permitted or acquiesced in the activity which gave rise to the cost of the remediation" (subsection (4));

- "In an action under section 47(5) . . . a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of the remediation" (subsection (5)); and

- "For the purpose of Section 47 of the Act, any compensation payable by a defendant in an action under 47(5) is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the *Negligence Act*" (subsection (3)).

In a nutshell, CSR section 35 provides that liability will only attach to responsible persons which "authorized, permitted or acquiesced" "in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated", according to "the relative degree of involvement, by each of the parties in the action", and depending upon which of them were involved with "the activity which gave rise to the cost of the remediation".

As such, and consistent with section 4 of the *Negligence Act* (per subsection 35(3)) "the court must determine the degree to which each person was at fault", that is, "[i]f loss or damage has been caused by the fault of 2 or more persons."

The 'polluter pays' principle of apportioning such liability or "fault" is underscored, and actually originates with section 47(5) of the Act, which is the provision that creates the civil cost recovery action. EMA section 47(5) provides that:

> "any person . . . who incurs costs in carrying out remediation at a contaminated site may pursue . . . the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part [, namely, Part 4, Divisions 1 to 6, sections 44 through 46.7, portions of which are extracted at Appendix "A" hereto.]"

What are "the principles of liability" under Part 4 of the Act, and in which provisions are they found? Among others, these include:

- the definitions of "operator" and "owner", and the integral concepts of "control" of use and 'responsibility' for operations (subsection 39(1));

- the responsibility of persons who "produced" or "transported" substances, "or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or part, caused the site to become a contaminated site", "or to migrate to the contaminated site." (subsections 45(1) & (2), paras. (c) & (d));

- the affirmative defence available to "persons … who would become … responsible … only because of an act or omission of a third party" – i.e. the 'third party' defence (para. 46(1)(c));

- the 'diligent purchaser' defence (para. 46(1)(d));

- the requirement for a manager considering a remediation order to "take into account private agreements respecting liability for remediation between or among responsible persons." (para. 48(4)(a));

- the further requirement for a manager to:

  > "name one or more persons whose activities**,** directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as
  >
  > (i) the degree of involvement by the persons in the generation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site; and
  >
  > (ii) the diligence exercised by persons with respect to the contamination" (para. 48(4)(b));

- the discretion provided to the manager to relieve "a minor contributor" of "joint and several liability" if that "would be unduly harsh" "in all of the circumstances" (subsection 50(1)), and fix both the administrative and civil cost recovery liability of such a party (subsections 50(2) & (3)); and

- the provision (in subsection 48(5)) that

  > "A remediation order does not affect or modify the right of a person to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release … of a contaminating substance." (subsection 48(5))

Note the striking similarity between the factors listed immediately above (see also further extracts from EMA Part 4, at Appendix "A"), and those from paragraphs (b) through (e) of CSR section 35(2) (Appendix "B"). Note in particular subsection 49(2), paragraph (c) of the Act, by which an allocation panel would be empowered to opine on both:

> "the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination

In other words, EMA Part 4, combined with CSR section 35, quite consistently and repeatedly underscores the guiding principle of 'polluter pays'. Not 'beneficiaries'; 'polluters', and only 'polluters'.

Namely, those persons actually responsible for the "generation, transportation, treatment, storage or disposal of "the substances that caused the site to become contaminated", or "the activity which gave rise to the costs of the remediation". That is, the individuals, corporations or government bodies which "authorized, permitted or acquiesced" in any of such activities.

As such, the authors' submission in *Beazer* has been that the true basis of any liability for cost recovery must be the authorization, permission or acquiescence of corporate, governmental or individual responsible persons "in the generation, transportation, treatment, storage or disposal of

the substances that caused the site to become contaminated", or the other activities "which gave rise to the costs of remediation".

That it is the polluters who should pay the cost of remediating the environmental contamination is further underscored by the "External Review of Remediation Liability Provisions: The *Waste Management Amendment Act*, 1993".[17] This pre-dated both the coming into force of the WMA and the enactment of the CSR. Indeed section 35 of the Regulation tracks the recommendations of the External Review, regarding clarification of the 'polluter pays' principle, virtually word for word.

Finally, the B.C. Supreme Court held, in *O'Connor v. Fleck*,[18] that no fault should be allocated to an "owner" of a site that neither caused, nor contributed to it becoming contaminated. That is, of course, what s. 1(3) of the *Negligence Act* requires, namely:

> [n]othing…make[s] a person liable for damage or loss to which the person's fault has not contributed.

(vii) What Are "Reasonably Incurred" Costs of Remediation

Although they also deal with other issues, the focus of the next two cases is the scope of the words "reasonably incurred" costs of remediation in the cost recovery provisions of section 47(5) of the EMA.

Workshop Holdings Ltd. v. CAE Machinery Ltd. ("Workshop #2")[19]

In this case, the British Columbia Supreme Court ordered a previous owner/operator of a polluted property in Downtown Vancouver to pay 90% of the clean-up costs incurred by the current owner in redeveloping such contaminated site. In doing so, the Court both: enforced the cost recovery provisions of the EMA and, in the process, resolved a number of liability issues in favour of the plaintiff current owner/developer, and therefore against the previous owner/operator that polluted the property.

By way of background, the plaintiff, Workshop Holdings Ltd. ("Workshop") sued the defendant, CAE Machinery Ltd. ("CAE"), for the recovery of costs incurred by the plaintiff in connection with the remediation of a contaminated site. Canadian Sumner operated an iron works and brass foundry on the property between 1924 and 1949. In 1964 Canadian Sumner changed its name to CAE Sumner and in 1965, to CAE Machinery. In 1960, one Annar Klokstad bought the property. Between 1964 and 1996, the property was used by a variety of tenants, including a trucking company, a scrap metal dealer and an auto paint and repair operation.

In 1996, Mr. Klokstad died, and the property passed to his wife. In 1997, the Klokstads' son, Eric, incorporated Workshop for the purpose of redeveloping the property. When Workshop began redeveloping the property it retained an environmental consultant, which undertook a

[17] Chris Tollefson, 1996
[18] 2000 BCSC 1147
[19] [2005] B.C.J. No. 940

detailed site investigation, and subsequently developed a remediation plan and obtained an approval in principle from the Province to proceed with the development.

During its investigations, the consultant identified zinc and copper as soil contaminants on the property, as well as the chemical 'signature' of foundry sand. Zinc and copper are the constituent elements of brass, CAE having operated a brass and iron foundry on the site. When the underground parkade was excavated, the contaminated soils were required to be disposed of at designated landfill sites. Workshop therefore sued CAE for those increased fill disposal costs, as well as their consultants' site investigation costs and related expenses, under the private cost recovery provisions of the Act.

The first issue to be decided by the Court was whether the site was contaminated. The Court made short work of this issue, holding that the consultant's reports and the Province's approval in principal of their remediation plan provided ample evidence of contamination.

The second issue was whether CAE was a "responsible person" under the Act. CAE challenged the admissibility of corporate records put into evidence by Workshop which connected CAE to Canadian Sumner. The Court relied on land title searches indicating Canadian Sumner's previous ownership, and an affidavit by a former employee of Canadian Sumner/CAE to conclude that CAE was a "responsible person".

Third, the Court addressed the issue as to whether Workshop, its principals or others were also "responsible persons". The Court held that just because the Klokstads may have known about the previous use of the property – for the operation of a foundry – does not mean they knew or suspected that the site was contaminated by copper and zinc. As such, the Klokstads and Workshop were protected by the 'innocent acquisition' provisions (section 26.6(1)(d)) of the EMA. Further, the Klokstads and Workshop had not introduced any new contaminants, but merely redistributed existing soil around the property. Finally, the Court held that the defendant's submission that others may be liable was speculative and not supported by any evidence.

Fourth, the Court considered whether the amount of Workshop's claim was excessive. The Court held that the amount claimed was generally reasonable, and ordered CAE to pay Workshop approximately $106,000 about 90% of the amount claimed. In arriving at its decision, the Court considered all of the consultants' invoices, as well as soil testing and borehole drilling costs and soil disposal costs paid to the two landfill operators and a trucking company.

Finally, CAE relied on section 8(1) of the Limitation Act, which provides that an action may not be brought "after the expiration of 30 years from the date on which the right to do so arose." The simple answer to this was that Workshop's claim was based on the private cost recovery provisions of the WMA/EMA, which created an entirely new cause of action, and did not come into force until the 1990s. Therefore, Workshop's cause of action did not arise until that time, when less than a third of the 'ultimate limitation period' had passed by the time it commenced proceedings against CAE.

Canadian National Railway Co. v. A.B.C. Recycling Ltd.[20]

The primary issue in this case was what costs of remediation CNR could reasonably recover from A.B.C. Recycling Ltd. ("ABC"). Canadian National Railway ("CNR") owned the lands in question between 1915 and 2003. In 1974, CNR sold a portion of the lands to ABC. ABC operated a scrap metal recycling operation on this portion. In 1999 and 2000, ABC remediated a portion of the CNR lands which had been accidentally contaminated by ABC's operation.

In 2000 and 2001, CNR engaged Keystone Environmental Ltd. ("Keystone") to conduct a preliminary environmental site investigation regarding possible contamination on CNR lands. The investigation revealed that CNR lands were contaminated with hydrocarbons, metals, and PCBs exceeding applicable standards. This discovery prevented CNR from development or sale of the affected lands. Keystone concluded that the contamination was attributable to the use and occupation by ABC of its property and the trespass and unauthorized disposal or storage of metals waste by ACB on the CNR lands.

ABC initially participated in the remediation of the contaminated areas, but was eventually asked to leave by CNR. Consequently, CNR incurred costs to remediate the lands before it moved forward in its development and sales plan. In December 2002, CNR received a conditional certificate of compliance from the Province. In obtaining the certificate, CNR was able to sell the land in December 2003 for more than $20 million.

ABC refused to pay CNR for the costs of remediation. As a result of this refusal, CNR commenced an action against ABC to recover its reasonable costs. ABC admitted its liability for the contamination and paid to CNR $200,000.00. However, CNR sought to recover an additional $140,000.00.

The first issue considered by the Court, was whether there was any effect on the recovery of reasonable costs, by CNR not seeking to recover certain costs paid in respect of the ABC contamination. The Court, in referring to sections 35(2)(e) and (f) of the Regulation, held that:

> Those sections of the Regulation support CN's contention that costs incurred but not attributed to ABC and for which recovery is not claimed are, indeed, a relevant consideration in the determination of the reasonably incurred costs of remediation.
>
> Further, common sense suggests that where an owner has incurred costs of remediation and chooses to allocate only a portion of those costs to the person responsible for the contamination, that must be considered to be fair and reasonable, provided that the costs are themselves reasonable. If an owner has fairly allocated those reasonable costs, that must be taken to be an indicator of reasonableness in the owner's position in respect of the claim to the costs of remediation.

[20] [2005] B.C.J. 982

The second issue before the Court was who had the burden of proof in demonstrating the reasonableness of the costs incurred in remediating the property. The Court held that the burden of establishing that the costs were reasonably incurred rests with the owner. The Court cited the following statement from *Workshop #2*, supra, in support of its decision:

> The owner's cost recovery could be limited by a manager's determination under s. 27.3(1) that a responsible person is a minor contributor to the contamination and, thus, entitled to the benefit of a limitation of liability under s. 27.3(3). Aside from that statutory limitation, the owner would be taking the risk that he might not later be able to establish in an action under s. 27(4) that the site was contaminated, that his costs of remediation were reasonably incurred, or that another person should bear some or all the responsibility for the contamination.

The next issue that was decided was what costs were reasonably incurred for remediation. The first point made by the Court was that this case was distinct from *O'Connor, supra,* because here the remediation had already been performed and it was not contested that it was proper and reasonable for CNR to undertake the remediation work.

According to the Court, the determination of the reasonably incurred costs of remediation requires an objective analysis of the costs in the particular circumstances of each case. Moreover, reasonable remediation costs in one set of circumstances may not be reasonable in a different set of circumstances.

In setting out its analysis the Court referred to the appellate decision in *Kates v. Hall*[21] for some guidance:

> The party seeking damages must prove what those damages are or should be. The defendant can adduce his or her evidence to refute that of the plaintiff. If the injured party has taken steps to repair the damage then the actual expenditures can be put in evidence, although even when presented with actual repair expenses the court is not bound to award that sum in compensation, see, for example, Lodge Holes Colliery Company Ltd., [1908] A.C. 323.
>
> …
>
> The law in British Columbia following Dykhuizen [Dykhuizen v. Saanich (District) (1989), 63 D.L.R. (4th) 211 (B.C.C.A.)] requires the court to ask what is reasonable in the circumstances, not, as argued by counsel for the appellants, what are the "express wishes" of the appellants.

In light of the foregoing, the Court must examine whether CNR acted reasonably with respect to the remediation of the ABC contamination and whether those costs are themselves objectively reasonable. Accordingly, it is open to the Court to accept that all or only some of the costs CNR claimed were reasonably incurred.

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[21] (1991), 53 B.C.L.R. (2d) 322 (C.A.)

Setting aside CNR's legal costs, the Court considered three specific areas of costs claimed by ABC to be unreasonable: prompt payment discounts, ministry fees and alternative methods of remediation.

First, with respect to prompt payment discounts, the Court found that a 5% reduction was available to CNR if invoices from Keystone were paid within 30 days. Further, the Court found that CNR paid its invoices promptly and as such, the prompt payment discounts were available to CNR. In the end, the Court held that ABC was entitled to receive the benefit of the prompt payment discount and commensurate with that ruling, CNR's costs were discounted appropriately.

Second, with respect to ministry fees, the Court found that CNR had paid the Province a total of $42,800. The Court found that it was ABC's trespass and contamination that led CNR to seek a conditional certificate of compliance. Moreover, it would be unreasonable to expect CNR not to obtain a certificate because common sense would suggest that a purchaser, prospective or otherwise, would insist on assurances concerning the need to remediate the land. Accordingly, the Court held that ministry fees were reasonable.

Finally, with respect to alternative methods of remediation, the Court found that ABC's argument that its approach to remediating the lands in 1999-2000 should have been adopted by CNR, ignored reality. CNR was entitled to adopt a careful approach in remediating the lands because it wanted to ensure that the certificate of compliance would be obtained on a first review by the Province. The Court therefore found the costs incurred by CNR were reasonable.

(viii) Do "Costs of Remediation" Include Legal Expenses?

The trial decision in *CNR v. ABC Recycling* was appealed on the narrow issue of whether "costs" of remediation includes legal expenses, under section 47(3)(c).

CNR Co. v. A.B.C. Recycling, supra[22]

ABC appealed an order in the trial decision discussed above that awarded to CNR their legal costs reasonably incurred in connection with the "costs of remediation" in cleaning up a contaminated site owned by CNR, pursuant to section 27(2)(c) of the *Waste Management Act.*

The issue hinged upon the proper interpretation of section 27(2)(c). In particular, the Court of Appeal considered whether the term "legal costs" could be interpreted to entitle CNR to its special costs against ABC.

The Court of Appeal held that CNR was not entitled to special costs. In the reasons for judgment, the Court observed that subsection 27(1) applies to legal and consulting costs associated with seeking contribution from other responsible persons. As such, the Court seems to conclude that the word "other" presupposes that there must be at least two "responsible persons" in order for subsection 27(1) to apply. Further, the Court notes that section 26 sets out that an owner or

[22] 2006 BCCA 429

operator is not responsible for the remediation of a contaminated site if that owner or operator did not cause the site to become contaminated.

As a result, the Court, on these two findings, concluded that CNR was not entitled to special costs because there was only one "responsible person", namely ABC. CNR was not a "responsible person" based upon section 26 because it did not cause the site to become contaminated. This decision, however, seems to overlook an important point. That is, CNR was a "responsible person" to the extent that it was an owner of the contaminated site. Although CNR did not cause the contamination of the site, that alone does not absolve CNR from responsibility for the site. In other words, CNR was still responsible for remediating the contamination on the site.

In any event, the Court also held that CNR was not entitled to special costs because ABC's conduct was not in any way sufficiently reprehensible to warrant an award of such costs.

(ix) Are There any Preconditions to Cost Recovery Actions?

The following decisions all deal with parties bringing actions for recovery of remediation costs.

The Swamy Decisions

In *Swamy v. Tham*[23] ("Swamy No. 1") and *Swamy v. Tham*[24] ("Swamy No. 2"), different judges decided that certain conditions must be satisfied in order for a claimant in a court action to proceed for the recovery of remediation costs, including:

- the costs must actually have been incurred, as distinct from future anticipated costs;
- a manager (pursuant to administrative procedure) under section 26(4) of the WMA (now s. 44 of the EMA) must have made a final determination that the site is a "contaminated site";
- a manager must make a determination as to who are the "responsible parties" in respect of the contaminated site;
- the parties must have otherwise complied with and exhausted the procedures of the WMA.

Accordingly, the general principles from the *Swamy* decisions are:

- in order to proceed with a cost recovery claim, parties must have complied with and exhausted the procedures of the applicable statute;
- a final determination as "contaminated" under the applicable statute must be obtained; and

[23] 2000 BCSC 1253
[24] 2001 BCSC 551

- costs of remediation must have actually been incurred.

These principles were further confirmed in *Beazer* where the court stated that a plain reading of the WMA made it clear that a claimant could only seek cost recovery from other responsible persons after first incurring remediation cost pertaining to the contaminated site.

No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.[25]

Seabright acquired a lot which was formerly used as a gas station. Seabright constructed a multi-story commercial and residential complex on the site after first remediating the contaminates that remained on the site from its days as a service station. Prior to remediation, Seabright developed a remediation plan. The plan received "approval in principle" from the Manager under the WMA. Seabright incurred costs in remediating the site. The Manager found that the property had been "satisfactorily remediated". Seabright sought to recover the remediation costs incurred from the prior owners and operators of the site, Imperial Oil and Mohawk.

With the *Swamy* decisions in mind, the defendant oil companies argued that the Manager had not made the necessary final determination under section 26(4) of the WMA (now 44(4) of EMA) to support a remediation cost recovery action. The oil companies also argued that the Manager had not named them as responsible person. Seabright, having cleaned up the site to the satisfaction of the Manager, was facing the possibility that the polluters might actually avoid paying the remediation solely on the technical basis that the Manager had not made a formal declaration that the site was contaminated and the oil companies were responsible.

In deciding for Seabright, the court held that, while finding that a site is contaminated is a pre-condition to a remediation cost recovery action, this pre-condition could be implicitly satisfied. The Manager approved the remediation plan and issued a certificate of compliance after the property had been remediated. Consequently, the Manager had in fact found that the site was a contaminated site implicitly by the issuance of the certificate of compliance.

Workshop Holdings Ltd. v. CAE Machinery Ltd.[26] ("Workshop #1")

The plaintiff, Workshop Holdings, redeveloped an industrial site. As in *Seabright*, supra, the plaintiff engaged environmental consultants. Consultants carried out a site investigation and prepared a site profile. They proposed a remediation plan which was approved by the Manager. The plaintiff incurred costs and remediated the property. The Manager issued a certificate of compliance. Workshop sued to recover its remediation costs. The defendant, relying upon the *Swamy* decisions, moved to dismiss the plaintiff's remediation cost recovery action. It argued that the Supreme Court had no jurisdiction to entertain the plaintiff's claim, as the plaintiff had not received the requisite determinations from the Manager, namely that the property was a contaminated site and that the defendant was a responsible person. The trial Judge adopted the rationale from the *Swamy* decisions and dismissed the plaintiff's claim.

[25] 2001 BCSC 1330, affirmed 2003 BCCA 57
[26] 2003 BCCA 56

The Court of Appeal reversed the trial decision and allowed the plaintiff's claim to proceed. In reaching its decision, the Court of Appeal looked behind the language of the WMA and focused on its intended purpose. The Court of Appeal held that the purpose of the independent recovery section was to streamline the remediation process and to reduce administrative time and expense which would ultimately encourage remediation of contaminated sites. Additionally, no provision of the WMA required an explicit contaminated site determination before a claim for remediation costs could proceed. Accordingly, a final determination of contamination was not necessary to bring a civil claim for remediation costs under the statute.

Petro-Canada v. British Columbia (Ministry of Water, Land and Air Protection)[27]

The issue before the British Columbia Environmental Appeal Board (the "Board") was whether the Province had jurisdiction under the WMA or the CSR to include indemnity clauses in the certificate of compliance and the conditional certificate of compliance.

The plaintiff, Petro-Canada, owned sites in Sechelt and in Golden. Petro-Canada contracted with SEACOR Environmental to provide site investigations and remediation to both sites. In May 2003, the Province issued a conditional certificate of compliance with respect to the Golden site. In December 2004, the Province issued a certificate of compliance with respect to the Sechelt site. Each certificate contained identical indemnity clauses requiring Petro-Canada to indemnify the Crown, and its employees against loss, damages, costs, actions, suits and claims arising from any contamination remaining on the site. Petro-Canada submitted that the imposition of the indemnity clauses went beyond the jurisdiction of the Province.

The Board held that the power to include the indemnity clauses had to be either expressly set out in the WMA or in the CSR. Further, the Board observed that the WMA and the CSR were silent in respect of the form and content of the certificate of conditional compliance and the certificate of compliance. This silence, however, did not grant unlimited discretion to the Province. Any conditions or terms of a certificate had to be consistent with the authority granted in sections 27.6(2) and (3) of the WMA and the overall purposes of Part 4.

The Board noted that although both certificates could be issued if any security had been provided in connection with the management of substances remaining on the site, the definitions of security in the *Interpretation Act* and the *Securities Act* did not expressly refer to indemnity. As such, there was no source of authority for the Province to impose indemnity clauses in the certificates.

B. COMMON LAW LIABILITY

In addition to statutory liability, liability for contamination may be imposed through common law actions initiated by parties who have suffered some form of damage, whether it be personal injuries or damage to property.

[27] [2006] B.C.E.A. No. 2

Accordingly, there are a number of torts which may be applicable in the context of imposing civil liability. A brief summary of each tort has been set out below in order to present the underlying principles and rationales for imposing civil liability in the context of environmental contamination. Additionally, corresponding case law has been provided to demonstrate each tort's specific operation and application.

(i) Nuisance

Generally, environmental claims are framed in any number of actions: nuisance, trespass and negligence or lumped together. The most common form of claim however is framed in the tort of nuisance. This is because a nuisance action can be shaped to conform to any type of environmental liability claim be it damages for water, land or even air pollution. In this regard nuisance claims usually fall into two categories: (1) any wrongful disturbance of an easement or other servitude appurtenant to land, and (2) wrongfully causing or allowing the escape of deleterious things into or onto another person's land.

The fundamental issue in a nuisance claim is whether, taking into account all the circumstances, there has been an unreasonable interference with the party's use and enjoyment of their land. Additionally, nuisance may also be alleged in cases where there is interference with the party's physical health. To establish a claim in nuisance, the party must show substantial interference which would not be tolerated by an ordinary occupier.

In considering the interference, the court must consider the type of interference, the severity, the duration, the character of the neighbourhood and the sensitivity of the plaintiffs' use of their lands. With respect to the severity of the interference, it is not actionable if it is a substantial interference only because of the plaintiff's special sensibilities. With respect to the character of the neighbourhood, the court should consider the zoning, whether the defendant's conduct changed the character of the neighbourhood and the reactions of other persons in the neighbourhood.

The court must balance theses considerations against the value of the defendant's enterprise to the public and the defendant's attitude toward its neighbour. The court must also consider whether the defendant was using the property reasonably having regard to the fact that the defendant has neighbours. Additionally, the court should consider whether the defendant took all reasonable precautions.

Since the tort of nuisance in grounded in property use, individuals with standing to sue are usually property owners. However, claims made in nuisance have also included any person who had status in regards to the property (such as a spouse or children) or a legal claim to the property (such as holders of easements or rights of way). Where an individual does not have standing to bring a claim, the action may be initiated on their behalf by the property owner.

In the context of a nuisance claim, liability is strict. That is to say, the absence of negligence on the part of the party causing the nuisance will not excuse them from liability. However, the courts have accepted a limited number of defences which may exempt a defendant from liability. Where some statute or legislation has expressly or impliedly authorized the use of a particular

thing, and that thing is used accordingly with proper precautions being taken then a defendant will only be liable if negligence can be shown. This is known as the defence of statutory authority. Other defences include (1) acts by third parties, (2) contributory negligence where it is alleged that the property owner making the complaint contributed themselves in some way to the nuisance and (3) volenti non fit injuria where the property owner making the complaint in some way authorized, consented to or 'came to" the nuisance. These last defences will not result in a complete bar against the plaintiff's claim unlike the defence of statutory authority which serves to completely immunize a defendant if successfully applied.

Where the claim involves private personal property, the action is referred to as a private nuisance claim. Where the claim involves any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience then the action is referred to as a public nuisance claim. The standing requirements to bring a public nuisance claim are substantially different from a private nuisance claim and will be discussed below.

(1) Private Nuisance

As stated above, actions framed in nuisance provide enough flexibility to deal with a wide range of environmental claims. Private actions may be initiated to deal with such matters as noxious fumes or odours or effluent from toxic or hazardous waste.

City of Portage La Prairie v. BC Pea Growers Limited[28]

The plaintiff, BC Pea Growers Ltd., was the owner of a seed cleaning mill and farm. Its adjacent neighbour to the south, the defendant, owned and operated a sewage lagoon, erected in 1958, for the purpose of disposing of sewage from the City of Portage La Prairie. The plaintiff claimed that from 1960 to the date its claim was made, water had seeped from the defendant's land onto the plaintiff's land, causing damage to the plaintiff's crops and flooding of the pit in its mill which could not be operated without extensive repairs. The plaintiff brought an action in nuisance and was successfully awarded an injunction to halt any further escape of effluent plus damages for his losses.

The Supreme Court of Canada, in upholding both the trial judge and the Court of Appeal's decision in finding for the plaintiff, stated that where a party creates a nuisance which causes damage then that party is liable for any loss or damages. In this case, the defence of statutory authority was not accepted by the court.

Pyke v. Tri Gro Enterprises Ltd.[29]

The plaintiffs were owners of properties in an area zoned for agricultural use. Their neighbour, the defendants, commenced operation of a mushroom farm in October of 1994. Within a month, there were a number of complaints about noxious odours emanating from the defendants' farm. The odours persisted from 1995 to 1999. Some of the plaintiffs kept detailed logs describing the

[28] [1966] S.C.R. 150
[29] [1999] O.J. No. 3217 (Ont. Sup. Ct.) and [1999] O.J. No. 5025 (Ont. Sup. Ct.)

frequency and intensity of the smells which kept them from going outdoors and also interfered with their sleep. Some of the plaintiffs also experienced physical reactions such as nausea, shortness of breath and burning eyes. At times a white haze with an ammonia smell was observed emanating from the defendants' farm.

After considering all the evidence, the court held that the operation of the defendants' farm had constituted a nuisance and set out its reasons for so finding as follows:

1. the odours emanating from the farm affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted the use of their lands;

2. the large number of plaintiffs, their testimony and their varied backgrounds was sufficient to satisfy the court that such interferences would not be tolerated in their location by an "ordinary" occupier;

3. the plaintiffs had resided for up to 58 years in the area which was of mixed use (residential and farming) however, the odours produced by the defendants' farm caused a degree of interference that was completely unheard of or tolerable within such a time period; and

The court also ruled that the defence of statutory authority did not apply and the defendants had been operating in breach of the province's Environmental Protection Act. As a result the court awarded damages to the plaintiffs but refused to grant an injunction.

In regards to the damages awarded, the court granted damages ranging in amounts from $7,500 to $35,000 depending on the individual effects of the nuisance. The court also held that where there was no sale or attempted sale of property, it could not compensate any plaintiff for loss of diminished property value.

Jones v. Mobil Oil Canada Ltd.[30]

The plaintiff operated a cattle ranch in Alberta. The defendant conducted oil and gas operations on the plaintiff's lands and on adjoining lands where the plaintiff's cattle grazed. The plaintiff brought a claim framed in negligence and nuisance alleging that (1) his cattle had been exposed to or ingested harmful chemicals, (2) the defendant had failed to erect adequate fencing, (3) the defendant had spilled harmful fluids and polluted the ground, groundwater and surface water and (4) the defendant had conducted its operations in such a way that allowed the plaintiff's cattle access to these pollutants.

To establish a nuisance claim, the plaintiff had to show that the defendant allowed a noxious substance to escape onto land owned, leased or occupied by the plaintiff which ultimately led to damage to the plaintiff's land or property. Evidence was presented at trial that contamination from a flare pit spread throughout the soil and ground water, necessitating the removal of a

[30] [1999] A.J. No. 797 (Alba. QB)

considerable amount of soil and the remediation of the site, including special arrangements to prevent further migration of contaminants through groundwater.

The court held that the defendant was strictly liable for the nuisance even though it had properly proceeded to correct the situation when the nuisance became apparent. In this case, a higher standard of care was required where there was a possibility that injuries from nuisance could arise. Such a rationale was based on the court's policy considerations in the face of a perceived land stewardship role held by the natural resource industry in Alberta.

(2) Public Nuisance

In most cases, actions for public nuisance require special "standing" in order to be commenced. These actions are typically brought on behalf of the Attorney General as representative of the public interest. In such cases the decision to actually commence an action in the face of a perceived nuisance rests solely in the hands of the Attorney General.

A person may commence a claim for public nuisance in their own right however to do so they must be able to prove that they have suffered special damage over and above that of the public at large.

Hickey v. Electric Reduction Co. of Canada[31]

The plaintiffs brought an action in nuisance against the defendant alleging that the discharge of poisonous waste from the defendant's phosphorous plant at Long Harbour in Placentia Bay destroyed the fish life of the adjacent waters and hence aversely affected commercial fishing. The defendant subsequently brought an application to dismiss the plaintiffs' private action on the grounds that the plaintiffs were not entitled to a remedy since the claim was one of public nuisance.

The court first analyzed the basis for the plaintiffs' cause of action and determined that since the pollution affected all other fishermen it was not a nuisance particular to the plaintiffs but was rather a nuisance committed against the public as a whole. An infringement or interference on a right held in common by all "Her Majesty's subjects" constituted a public nuisance. In such cases where the damage was common to all persons of the same class, the interference could only be vindicated through an action initiated by the Attorney General in the common interest of the public. Private actions in the face of public nuisance could only be brought where the individual suffered damage peculiar to themselves.

Hill v. Vernon (City)[32]

The defendant submitted a plan to construct a waste disposal plant which provided for discharge of waste into a nearby lake. The plan was approved by the Minister of the Environment and construction proceeded. Before the plant was operational, a number of lakeshore property

[31] (1970), 21 D.L.R. (3d) 368 (Nfld. F.C.)
[32] [1989] B.C.J. No. 144 (SC) reversed on other grounds [1991] B.C.J. No. 911 (CA)

owners (the plaintiff as representative) commenced an action for an injunction and for damages in nuisance. The defendant admitted that if allowed to proceed, the discharge would constitute a nuisance to the owners. As a result of the plaintiff's action, the defendant brought an application for summary judgment arguing the plaintiff had no standing as it was a public nuisance and that it had statutory authority to proceed under the Waste Management Act.

In reaching its decision, the court found that the plaintiff did have standing to bring the nuisance action. The question to be asked was whether the damage suffered by the plaintiff differed from that suffered by other members of the community. In that regard, the court held that the answer was yes and stated that while the discharge could be contemplated as a public nuisance, this would not bar the plaintiff from recovery if they could establish that the nuisance also constituted a private nuisance. However, while the court recognized that the plaintiff did have standing, it dismissed the action on the basis of the defence of statutory authority.

Gagnier v. Canadian Forest Products Ltd.[33]

The plaintiffs were commercial crab fishermen. The defendant operated pulp mills in Howe Sound where the plaintiffs harvested their crabs. The plaintiffs alleged that the defendants discharged on a continuous basis, noxious substances into the waters of Howe Sound that ultimately led to federal closures of the area for crab fishing for part of 1988 and all of 1989. The closure of the fishery resulted in a loss of income for the plaintiffs and accordingly they initiated an action in negligence, public nuisance, absolute liability and breach of statute. The defendant subsequently brought an application to dismiss the plaintiffs' claims.

In support of its application, the defendant submitted that the plaintiffs' nuisance claim was frame in public nuisance and accordingly could not succeed unless the effects of the nuisance were peculiar to the plaintiffs as set out in the ruling in *Hickey*. Low J. however dismissed this argument and stated that that the restriction set out in *Hickey* was far too narrow. He stated:

> Hickey is not binding on this court and I do not see it as having been considered in Stein [Stein and Tessler v. Gonzales (1984) 58 B.C.L.R. 110] to such an extent that all aspects of it must necessarily apply to the particular facts pleaded in the present case. Also, there is a line of three cases in Ontario which go in a different direction and which were not considered in Hickey or in Stein. They are: Crandell v. Mooney (l878) 23 U.C.C.P. 212, Rainy River Navigation Co. v. Ontario and Minnesota Power Co. (l914) 26 O.W.R. 752 and Rainy River Navigation Co. v. Watrous Island Boom Co. (l914) 26 O.W.R. 456, all decisions of the Ontario Court of Appeal. These cases all concerned obstructions to navigation and losses amounting to "special damage" caused to shipping enterprises. I think they support the argument that the restriction on private recovery for public nuisance in Hickey is far too narrow and that all that should need to be proved is a significant difference in degree of damage between the plaintiff and members of the public generally.

[33] [1990] B.C.J. No. 2359 (SC) and [1991] B.C.J. No. 2634 (SC)

At the subsequent trial of the matter, the court determined that the plaintiffs had failed to prove their damages. Consequently, although they had been allowed to proceed with their claims and had been granted standing, they were denied judgment as a result of the court failing to find any losses flowing directly to the plaintiffs as a result of the defendant's discharges.

Lastly, it should be noted that nuisance caused by companies does not limit liability to the company alone. Officers and directors may be personally liable where they had knowledge of the existence or continuance of the nuisance or if by exercising ordinary diligence in their official position they should have known of the nuisance (per *Cormier v. Blanchard*[34]). This principle also extends to partnerships (per *Tri-Gro* where members of the defendant partnership were deemed individually liable).

(ii) Trespass

Trespass to land involves either entering onto or placing something onto another person's property without any lawful justification. To establish liability in trespass a plaintiff must show (1) a conduct constituting trespass namely some form of direct physical entry onto or contact with the plaintiff's land and (2) that the plaintiff was in possession of the land at the time of the trespass. Once this is established the onus is on the defendant to establish the absence of intention in the commission of the alleged trespass. Other defences to an action in trespass include consent, necessity and legal authorization, all of which must be proved by the defendant.

In the case of environmental liability, trespass may be alleged in cases were contaminated or hazardous waste migrates from one property to another, whether deliberately or accidentally.

It is important to note that trespass is a strict liability tort. In accordance with the rule in *Rylands v. Fletcher*[35], liability will be assessed against a defendant if a plaintiff establishes: (1) the defendant made a non-natural use of his land; (2) the defendant brought onto his land something which was likely to do mischief if it escaped; (3) the substance in question escaped; and (4) damage was caused to the plaintiff's property or person as a result of the escape. Proof of negligence on the defendant's behalf is not required.

Mayberly v. Henry W. Peobody & Co. of London Ltd.[36]

The plaintiff brought an action against the owners and occupiers of property adjacent to his garden. He alleged that the defendants had caused or allowed a substantial quantity of debris and earth to accumulate in a pile directly in contact with his wall. The weight of the pile caused damage to the wall which was not designed to bear that type of load. Additionally, some type of chemical had been deposited into the mound and subsequently migrated through to the plaintiff's property, causing damage to the wall itself and contaminating the plaintiff's soil.

[34] (1980), 112 D.L.R. (3d) 667(NBCA)
[35] (1866), L.R. 1 Ex. 265, affirmed (1868), L.R. 3 H.L. 330
[36] [1946] 2 All E.R. 192

The court applied the principle of strict liability in deciding that a person who allows hazardous waste to accumulate on his own property will be strictly liable for damages if the waste percolates through to any other person's land. Accordingly, it held the defendant Peabody liable for the migrated contamination.

Hide-Away Resort Ltd. v. Van der Wal[37]

The plaintiff claimed damages against the defendant for trespass, nuisance and violation of the rule in *Rylands v. Fletcher*. The defendant constructed a large wood-waste landfill on his property on the Lougheed Highway and during its construction, wood-waste was placed on the plaintiff's property. After the trespass was discovered, the wood-waste was not removed from the plaintiff's property. Subsequently, it became unsafe and financially unreasonable to remove the wood-waste.

The plaintiff claimed for the cost of remediation of its land and the diminution in the value of its land by reason of the presence of wood-waste and risk of fire and methane generation. The plaintiff also claimed punitive and aggravated damages against the defendant. The defendant admitted the trespass but claimed it was not done wilfully or deliberately.

The court held that the plaintiff was entitled to damages for the trespass to reflect the diminution in value of its land and punitive damages for the defendant's failure to subsequently remove the waste.

(iii) Negligence

While nuisance is the most common claim for environmental contamination, negligence may also constitute a further ground for initiating a civil action in situations were a duty of care arises. In the context of environmental claims, a duty of care generally arises when the probability of personal injury or property damage was reasonably foreseeable. In order to succeed in such a claim, the plaintiff must show that (1) a duty of care existed between the parties, (2) the defendant breached the standard of care, and (3) the plaintiff suffered damages as a consequential result.

Heighington et. al. v. The Queen in right of Ontario et. al. and *Alejandria et. al. v. The Queen in right of Ontario et. al.*[38]

This action arose in respect of land that had been contaminated with radium and radioactive ash in the 1940's. The radioactive contamination was known by provincial government officials at that time. The land was ultimately expropriated by the province of Ontario in 1953 and was later transferred to the Ontario Housing Corporation. Pursuant to the province's home-ownership-made-easy plan, the land was subdivided and turned into a housing development in the early 1970's. In 1975 concerns about the property being contaminated arose and in 1980 it was eventually discovered that over 4000 tons of soil were radioactively contaminated. The province

[37] [1999] B.C.J. No. 234 (SC)
[38] [1987] O.J. No. 725 (Ont. HC) affirmed [1989] O.J. No. 1185 (Ont. CA)

failed to find an adequate disposal site for the contaminated material and consequently, remediation was not effected. The province offered to buy out all owners at market value as if the land had not been contaminated. The plaintiffs brought an action based on the grounds that the province had been negligent in failing to take appropriate steps to insure after 1945 that the site was safe for a housing development.

The court held that the provincial officials had been negligent in failing to ensure that any of the radioactive material, including contaminated earth, was safely removed back in 1945 or 1946. The court stated that it was reasonably foreseeable that if such material was not removed the health of future occupants of the land could be endangered. Development of the land into a subdivision for residential dwelling had been permitted but would probably not have occurred if the contaminated earth and material had been located in 1945 and 1946 and had not been removed. Additionally, the province had a statutory duty when considering a draft plan of subdivision to have regard "to the health, safety ... and welfare of the future inhabitants" including "the suitability of the land for the purposes for which it is to be subdivided".

British Columbia v. Canadian Forest Products Ltd.[39]

In the summer of 1992, a forest fire swept through the Stone Creek area of the Interior of British Columbia. Approximately 1,500 hectares were burned including: areas where the defendant Canadian Forest Products Ltd. ("Canfor") and other tenure holders were licensed to log, areas of steep slopes where it was uneconomic to log, other areas where the trees were too immature to log, and areas along watercourses subsequently declared by the Crown to have too much environmental value to permit logging at all.

In the previous year, Canfor had carried out a controlled burn of its slashing and other logging waste, which failed to extinguish itself over the winter as expected. This fact went undetected and the fire flared up again at the end of June 1992.

The trial judge found that Canfor was negligent in failing to detect the fact that the fire remained alight. Although Canfor's negligence contributed to the failure to suppress the resurrection of the fire, the trial judge found that the Crown's inadequate firefighting efforts also contributed to the loss. He considered it impossible to apportion degrees of fault or blameworthiness and thus divided responsibility evenly.

The Court of Appeal varied his decision by allocating 70 percent of the responsibility to Canfor and 30 percent to the Crown on the basis that Canfor had ultimately created the hazardous situation despite an opportunity to avoid it and thus Canfor was more blameworthy than the Crown.

It should also be noted that parties may be liable for statements made negligently which then subsequently cause damages. The Supreme Court of Canada in *Queen v. Cognos Inc*[40], set out the requirements for determining an action founded on negligent misrepresentation:

[39] [1999] B.C.J. No. 1945 (QL); (2002), 100 B.C.L.R. (3d) 114, 2002 BCCA 217; and 2004 SCC 38
[40] [1993] 1 S.C.R. 87

1. there must be a duty of care based on a "special relationship" between the representor and the representee;

2. the representation in question must be untrue, inaccurate, or misleading;

3. the representor must have acted negligently in making said misrepresentation;

4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

5. the reliance must have been detrimental to the representee in the sense that damages resulted.

As such, allegations of negligent misrepresentation and exposure to such liability may, as seen below, arise in the context of environmental contamination claims.

Sassy Investments Ltd. v. Minovitch[41]

The plaintiffs sued for damages arising out of the purchase of a property consisting of a gas bar, a convenience store and a residence. Prior to the sale, the plaintiffs were provided with an environmental report by the defendants Minovitch which the plaintiffs assumed gave them environmental clearance to proceed. The plaintiffs did not obtain an independent report although they were advised to do so by their own counsel. After the purchase of the property, the plaintiffs uncovered a leak resulting from the gas lines underneath the ground. The plaintiffs sued the defendants Minovitch for negligent misrepresentation and breach of contract. They also sued the defendant Shell Canada for negligent misrepresentation, breach of contract and negligence.

Upon weighing the evidence, the court held that only the defendants Minovitch were liable for negligent misrepresentation. The court found that the defendants Minovitch had made untrue representations and had failed to take any steps to ascertain the accuracy of any of their representations. The plaintiffs had subsequently relied on the representations and had bought the property. Shell Canada was not held liable for negligent misrepresentation but was found liable for improperly training the Minovitches to correctly measure underground tank levels and to properly respond to reported problems.

(iv) Stigma Damages

Claims for “stigma damages” are more commonly known as claims for residual diminution of property value after a contaminated property has been remedied. Say for example A and B own adjoining lots. A runs its own business while B operates a gas station. Gas or toxic chemicals from B’s lot migrate to A’s property causing contamination. A’s property is eventually remediated by B but the fact that A’s property was contaminated is now public knowledge. A advances a claim against B for stigma damages based on concerns that even if the contamination

[41] [1996] B.C.J. No. 1745 (SC)

has been remediated, the property may not be worth what it was prior to contamination since potential buyers may still be fearful that the property contains some residue of contaminants.

Although such claims are more prevalent in the U.S., claims for stigma damages may be beginning to make inroads in the Canadian court system. Recent Canadian authorities have show that where supported by proper evidence, awards for residual loss of value may be granted when the remediation performed does not fully eliminate the contamination. However, where evidence of residual loss is lacking or where there has been complete restoration of a property up to acceptable conditions, then no award for stigma damages will be granted.

Westfair Foods Ltd. v. Domo Gasoline Corp.[42]

Westfair as landlord brought an action against it's tenant Domo for damages resulting from the contamination of the leased property by hydrocarbons over a 25 year period of use. In 1995 Domo initiated remediation procedures at a cost of $386,397.65. Subsequent to the remediation, a report was submitted to the proper regulatory agency, Manitoba Environment who declared the property suitable for commercial development. Evidence was presented that some contamination remained and Westfair claimed that the property should have been remediated to the condition it was when the lease was first entered into in 1970 (ie. the property's original pristine condition). The court refused to award damages to Westfair based on the reasoning that Domo had restored the property to an appropriate and reasonable standard of care as set out by government guidelines. Additionally, the evidence showed that the property was safe for its highest and best use which in this case was no more than commercial use.

O'Connor v. Fleck

This claim for diminished property value involved another landlord and tenant situation. The landlord leased property to Fleck for the operation of a brass and aluminum foundry business. Fleck operated as a tenant for almost 30 years and the court found that during the course of his occupancy, the property became contaminated with lead. Based on the evidence at hand, the court awarded O'Connor costs for remediation. The court also contemplated O'Connor's claim for diminished property value. Although declining to award O'Connor any damages for diminished property value due to the fact that costs for remediation had already been awarded, the court did state that if any contaminated materials had been left on the property after remediation then the evidence would have been sufficient to justify awarding diminished property value damages in the amount of $50,000.

862590 Ontario Ltd. v. Petro Canada Inc.[43]

The plaintiff brought an action for damages resulting from the non-disclosure prior to sale of environmental contamination due to above and below ground storage tanks that had been previously located on the property. The plaintiff alleged damages in the amount of the total clean up costs of approximately $1.5 million since a negative effect would have been achieved if

[42] [1999] M.J. No. 1 (Man. QB), affirmed by [1999] M.J. No. 532 (Man. CA)
[43] [2000] O.J. No. 984 (Ont. Sup. Ct)

the plaintiff would have been awarded the value of the land after remediation had rendered it commercially usable. However, the court found that the plaintiff had not suffered any loss and dismissed its claim against the defendants. In discussing damages, the court rejected the suggestion that the valuation of the property should take into account any stigma associated with its contamination. The court stated that the evidence was clear that assuming cleanup to the satisfaction of the proper legislative guidelines was achieved there would likely not be any stigma attached to the remediated property.

Tridan Developments Ltd. v. Shell Canada Products Ltd.[44]

Tridan operated an adjacent lot to Shell. In September of 1990, an underground fuel line leak caused Tridan's property to become contaminated. At trial, the judge awarded remediation costs at $550,000 for remediation up to a "pristine condition". Additionally, the trial judge awarded $350,000 for loss of property value due to stigma associated with the contamination. The court of Appeal held that Tridan was entitled to either (1) the full value of the remediation costs without any further costs for stigma or (2) damages for remediation costs up to an acceptable guideline standard plus the additional $350,000 for pristine restoration in place of stigma damages, but not both. Accordingly, and based on the evidence at hand, the Court of Appeal concluded that there would be no residual reduction of value once remediation to a "pristine condition" was achieved.

(v) Class Actions

Over the past number of years, Canadian environmental law has seen the emergence of a new breed of lawsuits – the class action. Such actions have usually alleged damages due to mass exposure to alleged toxic or noxious odours, however, they have not met with any great measure of success. This may be based in large part on a pre-requisite hurdle not encountered in private actions – obtaining certification.

Hollick v. City of Toronto[45]

The plaintiff sought certification under the province of Ontario's *Class Proceedings Act* of a class action on behalf of 30,000 persons seeking damages with respect to noxious odours emanating from a nearby landfill site.

In rendering its judgment in denial of certification, the court stated that it could not find any common issues based on the plaintiff's claim of nuisance which could be manageably tried or would advance the litigation. The court set out its reasoning at paragraphs 20 to 22 as follows:

> It follows that liability for nuisance in the present case in favour of any individual property owner or resident, can only be established by evidence that the particular individual personally suffered sensible discomfort or evidence that emissions

[44] [2002] O.J. No. 1 (Ont. CA), leave to appeal to SCC dismissed
[45] [1999] O.J. No. 4747 (Ont. C.A.), leave to appeal to SCC dismissed

> from the defendant's premises have interfered with the reasonable enjoyment of their properties.
>
> We are not dealing with a plume that enveloped a neighbourhood for a defined period where, upon proof of the event, it can be assumed that everyone was similarly affected by a legal nuisance. The events complained of occurred sporadically over a number of years and with varying intensity of odour. The members of the proposed class live at various distances and directions from the landfill site and, of course, wind directions and velocity are constantly changing. The evidence also suggests, as an added complication, that there are alternative potential sources of odours in the community.
>
> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. A trial judge dealing with liability as a common issue would immediately discover that there was no economy in the proceedings and that the trial would be unmanageable. Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified. To add to the already impossible task, complaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property or caused personal discomfort justifying compensation.

Additionally, the court also stated that changing the label from private to public nuisance would not provide an alternative justification for a class action. In this case, the plaintiff was free to pursue his own action but there was no common issue to justify certification under the statute.

Cotter v. Levy[46]

The plaintiff sought certification under the province of Ontario's *Class Proceedings Act* of a class action on behalf of 650,000 in the greater Hamilton area who might have been exposed to poisonous and noxious gas released as a result of four day industrial fire. The plaintiff argued that exposure to the smoke defined the class and that the common question to be certified was whether those in the class experienced an opportunity of exposure to the potentially poisonous and noxious fumes.

The court rejected the plaintiff's argument and found that the plaintiff had failed to meet the criteria set down for the first requirement of certification; a class definition that is "certain, objective and readily ascertainable by lay persons". In considering this definition the court rejected outright that a class could be defined based solely on an assumption of rights to

[46] [2000] O.J. No. 1086 (Ont. Sup. Ct.)

damages. The court stated that it was well established in common law that a common question should not be presumptive of a judgment against the defendants on the substantive issues. This meant that a class could not be determined solely on the basis of "those persons who have suffered damages." The court then provided a more appropriate class definition for the case at hand to be "those persons who owned or occupied property within the extended area in the period of July 8-12, 1997, the dates of the fire". Accordingly, the plaintiff's motion was dismissed with leave to bring an amended certification motion at a later date.

Pearson v. Inco Ltd.[47]

The plaintiff sought certification under the province of Ontario's Class Proceedings Act of a class action on behalf of approximately 17,000 of the 18,500 residents in the city of Port Colborne. The plaintiff claimed damages against the defendant Inco Ltd. as a result of the continuous emissions from the operation of the defendant's metal refinery which the plaintiff alleged were toxic and/or known human carcinogens and which had subsequently contaminated the adjacent lands surrounding the refinery and Port Colborne itself.

The court dismissed the plaintiff's application for certification. In making its ruling the court stated that one of the requirements for certification was the necessity of the representative plaintiff to demonstrate not only a cause of action against each named defendant but every cause of action alleged against each defendant. The court held that defendants should not be subject to claims, particularly those asserted on behalf of a whole class of plaintiffs, which do not disclose a proper cause of action. Additionally, it held that all asserted claims impact on the question of whether there are common issues and the nature of the claims advanced will largely determine the proper members of the class. The court concluded that the plaintiff had failed to disclose a reasonable cause of action and that no identifiable class had been proven. The court also stated that while there were common issues proposed, in this case, a class proceeding was not the preferable approach for their resolution.

(vi) Pure Economic Loss

Pure economic loss can be described as economic loss that is neither connected to nor a consequence of physical injury to a person or their property. Canadian courts have recognized that negligence can cause pure economic loss but the Supreme Court of Canada in the seminal decision of *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*[48], limited the recovery of pure economic loss to five specific categories. While these categories are not closed, a claimant seeking to identify a new head of economic loss must pass the two-stage analysis set out in *Anns v. Merton London Borough Council*[49], namely:

1. whether there is a sufficiently proximate relationship between the parties that carelessness on the part of one might cause damage to the other; and,

[47] [2002] O.J. No. 2764 (Ont. Sup. Ct.)
[48] [1992] 1 S.C.R. 1021
[49] [1978] A.C. 728 (H.L.)

2. if there is a proximate relationship, are there policy considerations that serve to negative or limit the scope of the *prima facie* duty of care, the class of persons to whom it is owed, or the damages to which a breach of it may give rise.

The latest Supreme Court of Canada decision to canvas the issue of pure economic loss was *Martel Building Ltd. v. Canada*[50]. In *Martel*, the court reiterated the 5 categories where pure economic loss was deemed recoverable:

1. loss arising form the negligence of public authorities in the discharge of their statutory functions;

2. loss caused by reliance on negligent misrepresentations;

3. loss occasioned by the negligent performance of a service;

4. loss suffered from the negligent manufacture of shoddy goods or structures, and

5. relational economic loss.

Environmental loss claims may be categorized under the heading of pure economic loss where there is no present damage to the property owner or the property itself. Situations like this may arise when the property has never been designated a contaminated site but may still contain some trace amount of chemicals.

Essentially similar to a claim for stigma damages, the owner claims for a loss as the owner feels that, although in this case the property has not and will not be classified as contaminated, the mere fact that some chemicals have been found combined with the public's current environmental concerns about contamination might cause a prospective purchaser to hesitate before buying the property if it is put on the market or to offer less for the property than the buyer might otherwise offer. Accordingly, the owner brings a claim against the previous owner who sold them the property. The question is whether such a loss is recoverable? Such was the issue discussed in *66295 Manitoba Ltd. v. Imperial Oil Ltd.*[51]

66295 Manitoba Ltd. v. Imperial Oil Ltd., supra

The plaintiff purchased a piece of land from the defendant Wail Investments Ltd. in 1984. Prior to the sale, the property had from 1951 to 1977 been owned and operated by the defendant Imperial Oil Canada Limited ("Imperial Oil") as a gas station. In 1999, the plaintiff obtained financing for construction on the property but one of the conditions for financing was the requirement of obtaining an environmental assessment report. The report showed that some chemicals were present in the soil but not to the level that would result in a classification as contaminated. The plaintiff was not required to and in fact did not remediate the property. However, the plaintiff subsequently brought an action for damages claiming that the failure of

[50] 2000 SCC 60
[51] 2002 MBQB 145

the past owners to remediate caused a loss to the plaintiff since the property was worth less than it would have been if the property had been restored to a pristine state.

The court analyzed the plaintiff's claim and found that it did not fit into any one of the 5 recognized *Norsk* categories. It then went on to apply the *Anns* test and found that foreseeability and proximity had been established against Imperial Oil. However, the court found that the plaintiff could not overcome the policy consideration hurdle of the second stage and as a result dismissed the plaintiff's claim. In analyzing the second stage of the *Anns* test, the court provided 6 reasons against expanding *Norsk's* pure economic loss categories to cover this situation:

1. The spectre of indeterminate liability. The plaintiff had no intention of remediating the property which could result in a string of future owners bringing claims against Imperial Oil. This meant there would be no closure for Imperial Oil which was contrary to the objective of tort law: deterrence of the wrongdoer.

2. The need for stability and finality in commercial transactions. Investors needed to have a measure of certainty of their positions in acquisitions and sales of properties.

3. Allowing such a claim could essentially be viewed as providing a type of insurance for the purchaser to cover their own negligence in not making adequate inquiries prior to purchasing the property.

4. The regulation and statute under which the plaintiff wanted to make its claim was not one which contemplated the creation of tort liability for its breach.

5. Statutory legislation had been enacted which provided for a regulatory scheme where the property was determined to be contaminated. Creation of a right of action with a higher standard of care than the legislation should be discouraged in such cases.

6. The issue of value or adequacy of the price paid. There was no net loss to the plaintiff and essentially no loss to society.

C. SUMMARY

Based on the authorities above, it is clear that a wide range of liability may be imposed on parties deemed to have contributed to the contamination of land. Some types of liability might flow together such as nuisance, trespass and negligence. Other areas of negligence may be expanding to accommodate the public's concern for environmental issues. Class actions, claims for stigma damages and the possibility of an extended category for pure economic loss are all issues that will be explored in the future.

Additionally, both legislation and the courts have made statutory and common law remedies available to enable parties suffering damage or remediation costs to recoup their losses.

Accordingly, all land users should be aware of their exposure to liability to protect themselves from unnecessary civil claims and remediation costs.

III. INSURANCE COVERAGE

A. OVERVIEW

The "pollution exclusion" is a standard exclusion clause found most often in Commercial General Liability ("CGL") policies. It purports to exclude losses arising out of the discharge or escape of pollutants into the environment. Such exclusions were first introduced by insurers in the United States in 1970, as an industry response to litigation arising out of that type of loss. Prior to the introduction of the pollution exclusion, insurers wishing to avoid coverage for expensive pollution claims were left with the standard exclusions found in their CGL policies, which usually did not apply to these losses.

The pollution exclusions found in CGL policies usually take one of two forms, although various modifications also exist. The exclusion introduced in 1970 was not of the "absolute" variety found in most policies issued today, but contained an exception to the exclusion for losses which were "sudden and accidental". While there was extensive litigation in the United States over virtually all aspects of the clause, the most frequent dispute arose over the meaning of that phrase.

By the mid-1980s, insurers found themselves exposed to many court decisions interpreting the "sudden and accidental" exception to provide coverage in situations involving the discharge of pollutants over long periods of time. As a result of these decisions, and perhaps also due to the increasing frequency and size of environmental claims, the industry introduced the "absolute pollution exclusion". This new clause eliminated the "sudden and accidental" exception in an attempt to further restrict coverage. The absolute exclusion has resulted in its own body of case law, often on the issue of whether or not a given substance released in a given situation falls within the definition of "pollutant".

Insurers have at times attempted to further restrict their exposure to pollution claims by removing or modifying the provisions contained in the standard absolute exclusion. However, these provisions do not appear to have been interpreted more restrictively than the 1985 version of the absolute pollution exclusion, although they may limit the types of issues that can arise.

While the "sudden and accidental" exclusion is rarely (if ever) found in policies issued today, it continues to have significance in light of the fact that environmental protection legislation continues to evolve, and now makes former owners of property liable for remediation costs (see, for example, EMA, section 45 which designates former owners and operators of a contaminated site liable for the cost of remediation).

There are several ongoing cases in British Columbia in which companies and individuals who owned property in the 1960s, 1970s and 1980s (or even earlier) are the subject of court actions commenced in the 21st century, alleging that contamination currently on the property is the

result of negligent practices which occurred decades in the past. These actions often involve both absolute and non-absolute exclusions, and therefore, it is important for practitioners in this area to be aware of the issues that can arise.

The following is an overview of the common forms of pollution exclusions found in policies which apply to losses seen today, and the issues that arise most frequently. It is not meant to be an exhaustive summary of the case law, nor is it meant to identify every issue that might arise when individual policies are considered.

In addition, prior to reaching the issue of whether the pollution exclusion in a given policy might apply, it is necessary to determine whether or not the loss falls within coverage to begin with. This will involve a careful review of the policy's grant of coverage, including a consideration of whether or not the loss constitutes an "accident" or occurrence" depending on the policy in question, and whether the loss falls within the definition of damages.

B. EVOLUTION OF THE POLLUTION EXCLUSION

(i) 1970: Sudden and Accidental Losses Excepted

The typical pollution exclusion in the 1970s and early 1980s purported to exclude claims arising out of pollution, but also contained an exception for "sudden and accidental" discharges of pollutants. An example of such a clause is as follows:

> It is agreed that this policy does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water of any description no matter where located or how contained, or into any watercourse, drainage or sewage system, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

While there is a great deal of case law in the United States concerning the various terms contained in this type of clause, the issue which seems to have arisen most often relates to the definition of "sudden and accidental." This is not surprising, as an insured who is able to fit the loss within the exception to the exclusion is in a better position than one who must argue that the loss simply is not contemplated by the first part of the exclusion, which is fairly absolute.

In the early cases arising out of the 1970 pollution exclusion, courts in both Canada and the United States interpreted the "sudden and accidental" language very broadly, often holding that the two words should be interpreted to mean "unexpected and unintended." This interpretation led to many decisions holding that losses were "sudden and accidental" even where the contamination occurred over a long period of time. An example of this interpretation can be found in *Allstate Insurance Company v. Klock Oil Company*,[52] where the insurer refused to

[52] 426 N.Y.S. (2d) 603 (C.A. 1980)

defend claims arising out of a leak from a gasoline storage tank. The New York Court of Appeals held:

> the negligent installation or maintenance of the storage tank could result in an accidental discharge or escape of gasoline which would be both "sudden and accidental" though undetected for a substantial period of time... Also the word "sudden" as used in liability insurance need not be limited to an instantaneous happening... (at para. 5).

During the same period, the relatively few Canadian cases dealing with this issue followed similar reasoning, and interpreted the pollution exclusion equally broadly. See, for example, *Zatko et al. v. Paterson Spring Service Limited*,[53] which also involved claims arising out of leakage from an underground oil tank. The Ontario court relied on *Klock Oil*, and held that the original discharge was "sudden and accidental," in spite of the fact that it was not discovered for a considerable period of time thereafter. See also *Murphy Oil Company Ltd. et al. v. The Continental Insurance Company*,[54] where the court held that leak in a pipe could not have occurred other than suddenly.

Fortunately for insurers (and less so for insureds), a new trend began to develop in the later decisions, which interpreted the phrase much more narrowly. The courts appear to have begun to adopt a more common sense interpretation of the word "sudden", which, upon a plain reading, seems to contemplate a temporal element of "briefness". Thus in *Fireman's Fund Insurance Companies v. Ex-Cell-O-Corporation et al.*,[55] the United States District Court held as follows:

> Accordingly, I hold that "sudden" in the pollution exclusion includes the temporal component of briefness, and means "brief, momentary, or lasting only a short time." "Sudden" is to be contrasted with "gradual". The focus of the pollution exclusion is on the discharge or release of pollutants into the environment. When the discharge or release of a pollutant is brief or lasts only a short time, it comes within the meaning of the first element of the "sudden and accidental" exception to the pollution exclusion. (at 1326-7)

Similarly, in *State of New York v. Amro Realty Corp.*,[56] claims were brought with respect to the alleged disposal of chemicals in drains and septic systems. The United States District Court held as follows:

> Most importantly, this court has grave doubts that the New York Court of Appeals would conclude that a twenty year release of contaminants would fall within the "sudden and accidental" exception to the pollution exclusion clause and therefore need not be constrained to follow the intermediate court decisions discussed above.... There can be very little dispute that "sudden" means happening without

[53] [1986] I.L.R. 7682 (Ont. H.C.J.)
[54] [1981] I.L.R. 378 (Ont. Co. Ct.)
[55] 702 F. Supp. 1317 (Dist Ct. 1988)
[56] 697 F. Supp. 99 (Dist. Ct. 1988)

> previous notice or on very brief notice; unforeseen; unexpected; unprepared for, Webster's New International Dictionary (2d ed. unabridged 1954) and that "accidental" is defined as happening unexpectedly or by chance; taking place not according to usual course, Id. Even if the term accidental is determined from the insureds' point of view there is no use of the word "sudden" which is consistent with the events transpiring over a twenty year period…. As Judge Elfvin noted, such a construction of the word "sudden" would allow the exception to swallow the rule, rendering the pollution exclusion clause meaningless. (at 109-10)

This reasoning continues to be the prevailing view, as seen in the Supreme Court of Connecticut's recent decision in *Buell Indus. v. Greater N.Y. Mut. Ins. Co.*,[57] where the headnote reads as follows:

> The trial court properly concluded that the "sudden and accidental" exception did not apply here, the word sudden being included in the insurance policies so that only a temporally abrupt release of pollutants would be covered as an exception to the general pollution exclusion; the word "sudden" is not ambiguous simply because the dictionary includes within its definition the sense that an event may have occurred unexpectedly, and, there being no ambiguity, reference to extrinsic documentation such as drafting history was inappropriate...

The more recent Canadian jurisprudence has followed the U.S. trend in restricting the "sudden and accidental" exception to temporally abrupt releases of pollutants. In *BP Canada Inc. v. Comco Service Station Const. & Maintenance Ltd.*,[58] the Ontario High Court of Justice considered the *Fireman's Fund* and *Amro Realty* cases referred to above, along with other U.S. decisions, in a case arising out of gas leakage from the defendants' property which contaminated the soil and ground water in surrounding area. The court held as follows:

> In my opinion the term "sudden and accidental" in the exception to the environmental exclusion in the Gore policy definitely includes a temporal element and is clearly not to be extended to include unintended consequences that are not sudden. (at 9)

As a result, it appears that in future cases involving the "sudden and accidental" wording, it will be more difficult for insureds to enforce coverage where the exposure to pollution is gradual.

(ii) Current Significance of Old Policy Wordings

In spite of the fact that current policies no longer contain the "sudden and accidental" exception, the decisions cited above continue to be significant for insurers today. As science advances and environmental legislation becomes more strict, former owners of property sold decades ago are finding themselves exposed to court actions arising out of contamination that exists today. Current legislation in British Columbia also makes directors and officers of companies

[57] 791 A.2d 489 (Conn. 2002)
[58] [1990] O.J. No. 919 (H.C.J.)

personally liable for such claims (see EMA, s. 44 - definition of "person" includes directors and officers of persons), and those individuals are more likely to seek out and claim against insurers who issued policies to companies which long ago ceased to exist.

As a result, the insurance industry's exposure to claims arising out of past contamination will continue. It should also not be forgotten that more traditional claims such as nuisance and trespass continue to be available, and are often plead concurrently with the modern statutory causes of action. These causes of action may also arise out of pollution, and even where there is no statutory claim plead, the pollution exclusion might come into play.

Insurers should be especially aware of this issue in light of the Ontario Court of Appeal's recent decision in *Alie v. Bertrand & Frere Construction Co.*,[59] in which the plaintiffs in the underlying claim experienced problems with the foundation of their home. They sued the builders, who third partied their insurers. The court reviewed the available "trigger theories" governing insurance coverage, and held that while the proper trigger for coverage under a given policy is a fact-specific determination, in the case before the court, the policies covered the process of ongoing deterioration to the foundations, which culminated in the need for total replacement. As a result, all policies in effect from beginning to end of that process were required to respond to the loss.

This decision will impact liability insures whose policies cover some portion of a gradual environmental loss. As most environmental contamination involves ongoing deterioration of the environment, it will be open to insureds to argue that each policy from the outset of the contamination to the date of the claim should respond, and pay a proportional share of the indemnity and defence costs. As most CGL policies are subject to a limit of either $1 Million or $5 Million, while claims of this nature can cost significantly more than that, it will benefit both insurers and their insureds to seek out other available coverage whenever possible.

As a result, it is expected that insurers will continue to be faced with issues arising out of the "sudden and accidental" exception into the foreseeable future.

(iii) 1985: Absolute Pollution Exclusion

By the mid-1980s, insurers had been subjected for a decade to court decisions holding that the 1970 exclusion did not preclude coverage for gradual but unintentional pollution. As a result, the absolute exclusion was introduced, for the purpose of avoiding such decisions, and also to preclude coverage for the cost of government-mandated environmental cleanup, which was, at that time, becoming more prevalent. In the absolute exclusion, the insurance industry removed the "sudden and accidental" exception, and added very broad categories of situations in which the exclusion was to apply. A typical example of such an exclusion was found in the policy at issue in *Zurich Insurance Co. v. 686234 Ontario Ltd.*,[60] where the exclusion provided as follows:

> This insurance does not apply to:

[59] [2002] O.J. No. 4697 (C.A.)
[60] [2002] O.J. No. 4496 (C.A.)

1. Pollution Liability

a. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

1. At or from premises owned, rented or occupied by an insured;

2. At or from any site or location used by or for an insured or others for the handling, storage, disposal, processing or treatment of waste;

3. Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for an insured or any person or organization for whom the insured may be legally responsible; or

4. At or from any site or location on which an insured or any contractors or subcontractors working directly or indirectly on behalf of an insured are performing operations:

a. if the pollutants are brought on or to the site or location in connection with such operations; or

b. if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

b. Any loss cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Sub-paragraphs 1 and 4(a) of paragraph a. of this exclusion do not apply to "bodily injury" or "property damage" caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a "hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be. (at para. 4)

In the mid-1990s, some insurers further modified the wording of the absolute pollution exclusion, in an attempt to make it even more absolute. An example of this ongoing effort to eliminate any potential for coverage to be ordered in spite of the seemingly absolute nature of the standard absolute exclusion was found in the case of *Gencorp, Inc. v. American Int'l Underwriters*,[61] where the insurer eliminated the categories of discharges numbered 1-4 in the standard wording:

THIS POLICY SHALL NOT APPLY:

[61] 178 F.3d 804 (6th Cir. C.A. 1999)

to any liability whatsoever for:

(1) bodily injury, personal injury or property damage arising out of the seepage, discharge, dispersal, release or escape or transmission of any solid, liquid, or resulting from: gaseous, thermal, audio or electromagnetic irritant, including, but not limited to, smoke, vapors, soot, waves, fumes, acid, alkalies, fibers, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into, or upon, land, the environment or any watercourse or body of water; or

(2) any liability loss, cost or expense of the insured arising out of any direction or request by any governmental authority, that pollutants be tested for monitored, cleaned up, removed, contained, treated, detoxified or neutralized; or

(3) any payment for the investigation or defense of any loss, injury or damage, or any cost, fine or penalty, or for any expense or claim or suit related to any of the above.

Notwithstanding the generality of this exclusion, it shall not exclude coverage for claims by any person alleging personal injury, bodily injury or property damage caused by a product when such damage occurs or is alleged to have occurred after the product has been sold and before the product has become a waste product or part of a waste product. (at 809-810)

The United States Court of Appeals upheld this modified pollution exclusion, which removed the potential for coverage actions arising over issue of whether or not the location at which the discharge occurred fell within one of the categories set out in the 1985 standard version.

Another modification of the absolute exclusion involves the removal of the requirement that the pollution be discharged “into, or upon, land, the environment or any watercourse or body of water”. An example of such a modification is as follows:

This insurance does not apply to:

Pollution

(1) “Bodily injury” or “property damage” which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Generally speaking, U.S. insurers have been fairly successful in having the absolute pollution exclusion upheld, at least for “traditional” environmental contamination to land and water.

However, it does not appear that such modifications have had the effect of making the exclusion any more absolute. A modified exclusion without the "into, or upon, land, the environment or any watercourse or body of water" wording was considered by the Supreme Court of Illinois in *American States Insurance Co. v. Koloms*,[62] where the court held that the deletion of these words simply constituted the removal of a "redundancy" in the language of the exclusion. The court held that the more significant part of the exclusion was found in the words "discharge", "dispersal," "release", and "escape", which are terms of art used in environmental law to indicate the release of hazardous material into the environment (at 81-82).

While insurers in the United States have generally been more successful in upholding the absolute pollution exclusion than the 1970 version, this exclusion has also been subject to its share of litigation. Regardless of whether or not the policy includes the "standard" absolute pollution exclusion or one of the modified forms set out above, the litigation arising over this type of exclusion often relates to whether or not a substance alleged to have caused contamination constitutes an "irritant or contaminant," and therefore falls within the definition of "pollutants." This issue and some others arising out of the absolute pollution exclusion are discussed below.

C. ISSUES ARISING IN POLLUTION CASES

(i) Definition of "Pollution"

The wording of the absolute pollution exclusion appears on its face to be very broad. For example, to use an example found in several cases, if a person slips and falls on a spilled chemical cleaning product and suffers bodily injury, the absolute pollution exclusion arguably applies. Such a loss clearly arises out of bodily injury caused by the escape of a liquid chemical irritant. On a literal interpretation of the clause, the loss would be excluded. On this reasoning, the absolute pollution exclusion would arguably exclude losses arising out of pollutants in any context or for any reason.

An example of this type of interpretation can be found in the Supreme Court of Florida's decision in *Deni Assocs. v. State Farm Fire & Cas. Ins. Co.*,[63] where ammonia was accidentally spilled from a blueprint machine during the course of moving equipment inside a building. The fire department evacuated the building, set up ventilators, and broke windows in order to expedite ventilation. The building was turned back over to the building manager six hours later. Thereafter, claims were made against the insured for personal injuries sustained from inhalation of the ammonia fumes, and for loss of income due to evacuation of the building. The insured was covered by a CGL policy with State Farm, which contained an absolute pollution exclusion. The Supreme Court of Florida held as follows:

> We cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution…

[62] 687 N.E.2d 72 (Ill. 1997)
[63] 711 So. 2d 1135 (Fla. 1998)

> F.H.S. asks that this court, in essence, ignore the policy definition of "pollutants" or, perhaps more accurately, limit the term so that it is defined in the manner employed by environmental engineers, and thereby create coverage not provided by the policy. The court reiterates that it is not free to rewrite the terms of the insurance contract where that contract is not ambiguous. In this case, regardless of what is or might be a preferable definition from F.H.S.'s standpoint, or what would be the definition of choice from an environmental engineer expert's perspective, or the perspective of the scientific community, the policy definition of "pollutant", and the pollution exclusion construed as a whole is clear and unambiguous. Moreover, the claims that have been asserted against F.H.S. fall well within the exclusion. (at 1138)

Needless to say, the U.S. courts have not always been sympathetic to this type of argument, and many decisions interpreting the absolute pollution exclusion have indicated that only "traditional" types of environmental losses will be excluded.

For example, in *Koloms*, *supra*, the Supreme Court of Illinois restricted the definition of "pollutant" to those substances which are commonly recognized as environmental pollutants, rather than any incidentally related chemical or hazard. According to the court, to allow the exclusion to apply to such incidental hazards would result in the exclusion being so broad as to include a limitless array of losses involving materials that arguably fall within the definition of "pollutants". Therefore, the Supreme Court of Illinois upheld the lower court's holding and stated that:

> Accordingly, we agree with those courts which have restricted the exclusion's otherwise potentially limitless application to only those hazards traditionally associated with environmental pollution. We find support for our decision in the drafting history of the exclusion, which reveals an intent on the part of the insurance industry to so limit the clause. (at 79)

The court in *Koloms* noted the similar result in *Pipefitters Welfare Education Fund v. Westchester Fire Insurance Co*,.[64] where a Federal appeals court in Illinois had held as follows:

> Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution. (at para. 32)

In Canada, there is limited authority on point. However, there appears to be a trend emerging which follows the *Koloms* line of cases. In the first Canadian appellate decision on this issue, the

[64] 976 F.2d 1037 (7th Cir. 1992)

Ontario Court of Appeal has come down on the side of those courts which have limited the exclusion to more traditional forms of environmental contamination. In *Zurich Insurance Co. v. 686234 Ontario Ltd.*, *supra*, the court referred to and endorsed the reasoning found in the *Koloms* case, and held that the absolute pollution exclusion did not apply to carbon monoxide poisoning caused by a defective furnace in an apartment complex. The court held that "defective maintenance of a furnace giving rise to carbon monoxide poisoning, like related business torts… fail[s] the common sense test for determining what is pollution" (at para. 37).

The court in *Zurich* referred to the Alberta Court of Queen's Bench decision in *Medicine Hat (City) v. Continental Casualty Co.*,[65] where the plaintiffs in the underlying actions were employees of the City's bus system and their spouses. The plaintiffs complained of "exposure" to certain chemicals used in running the buses. While the parties agreed that the chemicals were "pollutants," the court drew a distinction between the alleged "exposure" and the standard language of the pollution exclusion, which applied to the "discharge, dispersal, release or escape" of pollutants. In holding that the claims were not clearly beyond the scope of the policy, the court stated as follows:

> Discharge, dispersal, release or escape of pollutants" is the language of improper or unintended events or conduct. It is not the language of intended use or consequences or of the normal operation of facilities or vehicles. In this case, the polluting substance or gas is part of and confined to the intended and normal operation of a transit garage and buses. This conduct and these events do not fall within the exclusion clause. In my view, the pollution exclusion clause is intended to protect the insurer from liability for the enforcement of environmental laws. The exclusion clause uses environmental terms of art because it is intended to exclude coverage only as it relates to environmental pollution and the improper disposal or contamination of hazardous waste. (at para. 27)

The two very recent cases cited above are consistent with the B.C. Supreme Court's 2000 decision in *Great West Development Marine Corp v. Canadian Surety Co.*,[66] where the insured was a developer covered by a construction wrap-up liability policy. The policy contained an absolute pollution exclusion.

In *Great West*, the developer and three contractors on a condominium project were sued for allegedly dumping contaminated fill onto the plaintiff's farm. The Statement of Claim referred to "contaminated fill" and the "leaching of toxic chemicals". However, the plaintiff's evidence was that the fill consisted of sandy silt and clay, along with stones and construction debris including, but not limited to, creosote pilings. The court reviewed the evidence and held as follows:

> The ingredients in the mix of excavated material in question might well contaminate topsoil but they are not necessarily contaminants in the abstract. The

[65] [2002] A.J. No. 350 (Q.B.)
[66] [2000] B.C.J. No. 939 (S.C.)

> mix constituting the excavated material, for example, may well not qualify as an environmental pollutant.
>
> It is unclear to me on the pleadings that the fill from the construction site could reasonably be considered a pollutant in the general sense of being harmful, or having in any significant quantity components or ingredients that might be thought inherently harmful, dangerous or of likely deleterious effect. (at paras. 26-27)

As a result, the court ordered the wrap-up insurer to defend the claim.

The *Zurich, Medicine Hat* and *Great West* cases suggest an emerging trend in Canada consistent with the *Koloms* line of authority in the United States. This type of analysis is consistent with the general principle that exclusion clauses are to be construed narrowly (see *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*[67]). It is also consistent with the Supreme Court of Canada's decision in *Derksen v. 539938 Ontario Ltd.*,[68] where that court dispelled any notion of a presumption that coverage fails if one of several concurrent causes is an excluded peril. This is particularly so in the context of *Great West*, where there was the potential for losses caused both by "pollutants" and also by simply the negligent delivery of the wrong type of soil.

(ii) Temporal Concerns and Intervening Acts

The focus on the words "discharge", "dispersal", "release", and "escape" found in the *Koloms* and *Medicine Hat* decisions has also caused insurers some difficulty in dealing with certain types of more traditional environmental claims, such as those made under CGL policies by remediation contractors, who had nothing to do with the original escape of pollutants. For example, in *Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.*,[69] the Ontario Court of Appeal held that the words "discharge, dispersal, release or escape" contained in the pollution exclusion would not apply to contamination already on the premises when the insured arrived.

In that case, the respondent was a contractor principally engaged by property and casualty insurers to clean up or remediate property damage, including oil spills. It was alleged that the contractor breached its contractual obligation by failing to carry out remedial work within a reasonable time and was negligent in performing the work, such that the plaintiffs suffered property damage and health problems beyond those suffered as a result of the original contamination.

The insurer attempted to deny coverage on the basis of the pollution exclusion, and the Ontario Court of Appeal held as follows:

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[67] (1993), 13 C.C.L.I. (2d) 162 at 176 (S.C.C.)
[68] 2001 SCC 72
[69] [2001] O.J. No. 4936 (C.A.)

> Hope was neither an active nor a passive polluter in respect of the original spill, for which it had no responsibility. Hope's alleged failure to remediate the situation in a timely manner constitutes an independent act, which occurred after the original discharge and therefore constituted an independent cause of the plaintiffs' loss. There is no claim made against Hope for damage caused by the original escape, nor could there be. The claim against Hope does not arise out of the original escape of the oil but out of its later action in failing to clean up the oil and prevent future damage beyond the time when the situation should have been remediated. Therefore the damage allegedly caused by Hope's negligence does not arise out of the escape, discharge, dispersal or release of a pollutant as prescribed in the clause (at para. 72).

Thus the Court of Appeal held that the exclusion clause was restricted to new escapes which occurred while the insured contractor was on site, and not to contamination which was already present. The dissent in that case held that the negligence of the remediation contractor could not be held to be an intervening act which broke the chain of causation. As a result, the loss did in fact arise out of the initial discharge of pollutants, and therefore, the pollution exclusion should have applied.

It is of note that certain prominent Canadian authors,[70] have voiced their support for the dissenting opinion in the *Trafalgar* case, and suggested that the majority decision has the effect of equating the contractor's CGL policy with Environmental Errors & Omissions Policies. Such policies are available in the marketplace and are priced in accordance with the risks covered. Alternatively, those authors suggest that the CGL policy in *Trafalgar* was transformed into a performance bond. Either way, this is clearly not the result contemplated by insurers issuing such policies, and it remains to be seen whether or not courts in other Canadian jurisdictions will side with the majority opinion in *Trafalgar*.

(iii) Regulatory Negligence and Distinction Between Active and Passive Polluters

An issue that has arisen with some frequency in the United States, and occasionally in Canada, is whether or not the pollution exclusion applies to claims against active polluters only, as opposed to "passive" polluters, who merely stand aside and allow pollution to occur. One of the situations where this issue arises is in claims of "regulatory negligence", whereby government bodies are sued as a result of contamination or pollution that allegedly should have been prevented.

In *Ontario v. Kansa General Insurance Co.*,[71] the Provincial Crown was sued for allegedly failing to respond to a pollution problem of which they were or should have been aware. The Crown was covered by a CGL policy issued by Kansa. That policy contained a non-standard but nevertheless absolute pollution exclusion. The insurer defended pursuant to a reservation of rights, but later asked the Crown to take over the defence. The Crown applied for an order requiring Kansa to defend the claim. The motions Judge referred to various American decisions

[70] Snowden & Lichty, "Annotated Commercial General Liability Policy", 2002, Canada Law Book Inc., at 31-16
[71] [1994] O.J. No. 177 (C.A.)

and held that the exclusion applied only to active polluters. Therefore, Kansa was ordered to defend. Kansa appealed.

The Ontario Court of Appeal took a different view. They held that the conflicting American decisions were unhelpful, although even assuming that the exclusion did apply only to active polluters, the Crown was "just as much a polluter as the active polluter" under the applicable legislation, which made it an offence to permit the discharge of chemicals (at 5). The Court of Appeal held that the Crown's regulatory negligence did not constitute an intervening act sufficient to break the chain of causation between the escape of pollutants and the damages suffered by the plaintiff. As a result, the loss arose out of pollution, and the exclusion applied.

This decision will assist insurers in defending claims brought by insureds who, while not actively polluting, are nevertheless involved in the process, either in a regulatory or supervisory capacity. It appears that the only ways that an insured can avoid the exclusion on the basis that it was not an active polluter, are to break the chain of causation by proving that its negligence is truly an intervening act sufficient to remove itself from the original discharge, or to demonstrate concurrent causation and bring the *Derksen* rule into play.

The reasoning in *Kansa* allows that decision to be reconciled with the decision in *Trafalgar*, where the contractor played no role in the original contamination. However, in jurisdictions such as British Columbia, where the EMA makes "operators" of sites responsible for the cost of remediation[72], the contractor in *Trafalgar* would arguably be in the same situation as the Crown in *Kansa*. This provides further support for the views of Snowden and Lichty.[73]

In the United States, the courts have, at times, taken a different view of the active versus passive distinction. For example, in *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*,[74] the insured was the subject of three separate claims under the *Comprehensive Environmental Response, Compensation and Liability Act* ("CERCLA"). There was no evidence that the insureds were active polluters. Their CGL policy contained a pollution exclusion which excluded damage arising out of the "discharge… of contaminants or pollutants into or upon land", except where sudden or accidental (at para. 16). The insured argued, and the court agreed, that because the exclusion did not specify whether it applied only where the insured was an active polluter, it contained an ambiguity. As a result, the policy was interpreted in favour of the insured, and the insurer was required to defend the claims.

While this argument might not succeed given the reasoning in *Kansa*, it may well be raised, given the dearth of Canadian case law on the subject.

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[72] Section 26.1 of the *Waste Management Act* makes an operator responsible for remediation, while s. 26.6(h) removes liability for contractors such as the one in *Trafalgar*, unless the work is carried out in a negligent fashion:

> (h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion (emphasis added)

[73] *supra*, note 64

[74] 1989 Ill. App. LEXIS 256

D. SUMMARY

Insurers and insureds alike must be aware of the various types of pollution exclusions contained in their policies, and the issues surrounding each. As stated above, it is expected that the non-absolute pollution exclusion will continue to arise in claims involving historical contamination of land, as former owners and directors of corporate owners continue to be sued for the recovery of costs associated with environmental remediation.

While it is expected that the coverage issues surrounding the pollution exclusions will always be raised where the cost of remediation is high, the more recent cases on the 1970 exclusion tend to side with the insurers, at least where the loss is gradual as opposed to (for example) a sudden oil spill.

In addition, the courts have been fairly consistent in upholding the absolute pollution exclusion, subject to those situations discussed above. This is possibly due to public policy considerations, including a fear that if pollution is covered by CGL insurers, polluters will have no incentive to reduce or eliminate their polluting activities. If there is no insurance coverage for such activities, it has been suggested (perhaps optimistically) that companies, and their directors who face personal exposure, will think twice before polluting. The result of such considerations will, in theory, be a cleaner environment.

Nevertheless, regardless of the viability of a given argument made in respect of a given policy, it is important for insurers and their insureds, as well as their brokers, to maintain copies of all historical policies and wordings that remain available, which might be triggered in the event of a future contamination claim. It is possible to avoid the great deal of time and expense involved in proving the contents of policies if copies are readily accessible.

While the issues covered herein can be used as a starting point, it is important to remember that the examples cited above each turn on their own facts, and in considering the issues arising in a given case, a very careful consideration must be given to the particular facts of the loss and to the specific wording of the insurance policy or policies in question.

IV. CONCLUSION

To summarize, the principles governing common law liability for environmental contamination are relatively clear, and the prospects for stigma damage claims and class actions are very real. However, there is very little case on EMA and the CSR, which represent a new reality for environmental litigation in British Columbia. Nevertheless, the concept of ‘polluter pays’ also runs through such statutorily imposed civil liability in this Province.

The insurance industry has tried to keep pace with developments in environmental litigation, and reduce its exposure for remediating contamination, but the so-called “absolute” pollution exclusion is increasingly, under attack. Among other things, it was simply not designed to deal with legislation such as EMA and the CSR. As such, liability insurers may become unwilling participants in clean-up cost recovery litigation.

Finally, provincial or other levels of government may find themselves becoming active participants in such cases, or even potentially responsible persons in the administrative remediation order process. The Britannia Mine settlement is an example of such an approach by private "owners" and "operators" of a "contaminated site". That may not have been the Province's intention, when the WMA was enacted. But, in hindsight, it seems preferable to having been a defendant in the multi-million dollar *Beazer* case, settlement of which is still being negotiated. The Britannia process, by contrast, was completed in less than half the time, before a remediation order was issued, let along a lawsuit started.

Neo J. Tuytel
direct: (604)643-3180
email: njt@cwilcon.com

Jonathan L.S. Hodes
direct: (604)643-3168
email: jlh@cwilcon.com

Document No. CWA7323.2

APPENDIX "A"

EXTRACTS FROM PART 4 OF *ENVIRONMENTAL MANAGEMENT ACT*:

Definitions and interpretation

39 (1) In this Part,

…

"contaminated site" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

(a) a special waste, or

(b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;

…

"government body" means a federal, provincial or municipal body, including an agency or ministry of the Crown in right of Canada or British Columbia or an agency of a municipality;

…

"operator" means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 44.5 (3);

…

"owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 44.5 (3);

"person" includes a government body and any director, officer, employee or agent of a person or government body;

(2) A government body is not an operator only as a result of

(a) exercising regulatory authority with respect to a contaminated site,

(b) carrying out remediation at a contaminated site, or

(c) providing advice or information with respect to a contaminated site or any activity that took place on the contaminated site.

Persons responsible for remediation at contaminated sites

45 (1) Subject to section 46, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation at a contaminated site that was contaminated by migration of a substance to the contaminated site:

(a) a current owner or operator of the site from which the substance migrated;

(b) a previous owner or operator of the site from which the substance migrated;

(c) a person who

(i) produced the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;

(d) a person who

(i) transported or arranged for transport of the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.

Persons not responsible for remediation

46 (1) The following persons are not responsible for remediation at a contaminated site:

…

(c) a person who would become a responsible person only because of an act or omission of a third party, other than

(i) an employee,

(ii) an agent, or

(iii) a party with whom the person has a contractual relationship,

if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(d) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

(ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and

(iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

…

(g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;

…

General principles of liability for remediation

47 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

…

(3) For the purpose of this section, **"costs of remediation"** means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.

(4) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

(5) Subject to section 50 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

…

(9) The court may determine, unless otherwise determined or established under this Part, any of the following:

(a) whether a person is a responsible person for remediation at a contaminated site;

(b) whether the costs of remediation at a contaminated site have been reasonably incurred;

(c) the apportionment of a share of the costs of remediation at a contaminated site amongst one or more responsible persons in accordance with the principles of liability set out in this Part;

(d) such other determinations as necessary to a fair and just disposition of these matters.

Remediation orders

48 (1) A manager may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;

(c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.

(3) When considering whether a person should be required to undertake remediation under subsection (2), a manager may determine whether remediation should begin promptly, and must particularly consider the following:

(a) adverse effects on human health or pollution of the environment caused by contamination at the site;

(b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;

(c) the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

(d) in consultation with the chief inspector appointed under the *Mines Act*, the requirements of a reclamation permit issued under section 10 of that Act;

(e) in consultation with a division head under the *Petroleum and Natural Gas Act*, the adequacy of remediation being undertaken under section 84 of that Act;

(f) other factors, if any, prescribed in the regulations.

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a contaminating substance.

Allocation panel

49 (1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.

(2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:

(a) whether the person is a responsible person;

(b) whether a responsible person is a minor contributor;

(c) the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination if the costs of remediation are known or reasonably ascertainable.

(3) When providing an opinion under subsection (2)(b) and (c), the allocation panel must, to the extent of available information, have regard to the following:

(a) the information available to identify a person's relative contribution to the contamination;

(b) the amount of substances causing the contamination;

(c) the degree of toxicity of the substances causing the contamination;

(d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;

(f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;

(g) in the case of a minor contributor, factors set out in section 45.3(1)(a) and (b);

(h) other factors considered relevant by the panel to apportioning liability.

…

Minor contributors

50 (1) A manager may determine that a responsible person is a minor contributor if the person demonstrates that

(a) only a minor portion of the contamination present at the site can be attributed to the person,

(b) either

(i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or

(ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and

(c) in all circumstances the application of joint and several liability to the person would be unduly harsh.

(2) When a manager makes a determination under subsection (1) that a responsible person is a minor contributor, the manager must determine the amount or portion of remediation costs attributable to the responsible person.

(3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

Cost recovery if Minister carries out remediation

59 (1) The manager may attempt to recover all or a portion of the cost of remediation by

(a) taking stesp to identify and recover costs from responsible persons during or after remediation,

(b) arranging to sell or selling any property comprising all or part of the site, or

(c) seeking contributions from available cost sharing agreements with government bodies or other persons.

...

(3) If the Supreme Court is satisfied that the expenditure incurred by the government under this section was either

(a) excessive, taking into consideration the requirements of the regulations governing remediation, or

(b) unnecessary, taking into consideration the regulations governing remediation,

the Supreme Court may reduce or extinguish the amount of the judgment that it would otherwise have ordered to be entered against the person against whom the action has been brought.

APPENDIX "B"

SECTION 35 OF CONTAMINATED SITES REGULATION

Compensation payable for actions under section 47(5) of the Act

35(1) For the purposes of determining compensation payable under section 47(5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

(2) In an action between 2 or more responsible persons under section 47(5), the following factors must be considered when determining the reasonably incurred costs of remediation:

(a) the price paid for the property by the person seeking cost recovery;

(b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) any remediation measures implemented and paid for by each of the persons in the action;

(f) other factors relevant to a fair and just allocation.

(3) For the purpose of section 47 of the Act, any compensation payable by a defendant in an action under section 47(5) is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the *Negligence Act.*

(4) In an action under section 47(5) of the Act against a director, officer, employee or agent of a person or government body, the plaintiff must prove that the director, officer, employee or agent authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation.

(5) In an action under section 47(5) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.